

Supreme Court, U.S.  
FILED

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No. \_\_\_\_\_ OFFICE OF THE CLERK

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IN THE  
**Supreme Court of the United States**

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GLEN WHORTON, Director, et al.,

*Petitioners,*

v.

STEVEN WAYNE COLLIER,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Is a federal court required to afford a presumption of adequacy to a state procedural bar that was clearly and expressly relied upon by the state court to preclude consideration of a claim that was subsequently presented in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254?
2. In a federal habeas corpus action brought pursuant to 28 U.S.C. § 2254, what showing is necessary to place at issue the adequacy of a state procedural bar that was clearly and expressly relied upon by the state court to preclude consideration of a claim?
3. Which party bears the ultimate burden of demonstrating the adequacy or inadequacy of a state procedural bar?

## **PARTIES TO PROCEEDING**

Glen Whorton, Director, Nevada Department of Corrections

George J. Chanos, Attorney General of the State of Nevada

Glen Whorton is the successor in office to Robert Bayer.

George J. Chanos is successor in office to Brian Sandoval.

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The Petitioners above-named (the State) file this petition for writ of certiorari seeking an order vacating the June 3, 2005 Opinion and Order of the United States Court of Appeals for the Ninth Circuit, *Collier v. Bayer*, 408 F.3d 1279 (9th Cir. 2005), wherein the Court of Appeals determined that a Nevada state procedural bar, NRS 34.726(1), was inadequate as applied even though the Court of Appeals had previously determined that very procedural bar was generally adequate.

## **OPINIONS AND JUDGMENTS BELOW**

The Court of Appeals reversed the judgment of the District Court. *Collier v. Bayer*, 408 F.3d 1279 (9th Cir. 2005). Appendix A. The petition for rehearing and suggestion for rehearing en banc was denied on August 9, 2005. Appendix B.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

28 U.S.C. § 2254

N.R.S. 34.726

NRAP 4(b)

## **STATEMENT OF THE CASE**

On May 17, 1995, Steven Collier, the federal habeas petitioner below, pled guilty to one count of possession of a trafficking quantity of a controlled substance. In the plea agreement, the parties stipulated to a forty-five (45) year term of imprisonment. Collier was sentenced to a forty-five

(45) year term of imprisonment.

The court filed the judgment of conviction on July 5, 1995. Appendix K-1.

Collier did not file a direct appeal within the 30 days after entry of the judgment of conviction, nor did he file either a motion in arrest of judgment or a motion for new trial. Thus, pursuant to N.R.A.P. 4(b), the right to appeal his judgment of conviction expired on August 4, 1995. Appendix I-1.

On March 21, 1997, over eight (8) months after his appeal and state habeas opportunities had expired because of the passage of time, Collier filed a motion to correct illegal sentence in state court. Appendix H-2.

On March 26, 1997, the state court filed an amended judgment which included the relevant statutory provisions under which Collier was convicted; however, it did not change Collier's term of imprisonment. Appendix J-1. Collier did not seek reconsideration of his motion to correct an illegal

sentence or appeal the district court's failure to rule on his motion to limit his sentence to 2 years or any other aspect of the amended judgment entered March 26, 1997.

On May 20, 1997, Collier filed a second motion to correct an illegal sentence. The state district court denied the motion. Collier appealed the denial to the Nevada Supreme Court, and it issued an order dismissing the appeal. Appendix H-1.

On November 16, 1998, Collier filed a notice of appeal concerning his conviction. The Nevada Supreme Court dismissed the appeal, finding that Collier's untimely notice of appeal failed to vest jurisdiction in the court. Appendix I-1.

On May 28, 1999, Collier filed a state post-conviction petition for writ of habeas corpus. The State district court denied the petition, finding it procedurally barred. The court also found that Collier was unable to show good cause and prejudice to overcome the bar.

Collier appealed the denial of his post-conviction petition to the Nevada Supreme Court. Appendix G-2 to G-3.

However, prior to the Nevada Supreme Court deciding the appeal, Collier filed a federal petition for writ of habeas corpus, which contained two grounds. Subsequently, Collier filed an amended federal petition. Appendix E-1.

The State moved to dismiss the amended petition based upon exhaustion grounds.

On January 11, 2001, the Nevada Supreme Court entered an order affirming the state district court's denial of Collier's state habeas petition. Appendix G-1.

The Nevada Supreme Court held: —

Appellant filed his petition approximately four years after entry of the judgment of conviction and one and one-half years after entry of the amended judgment of conviction. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was



procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

In an attempt to demonstrate cause for the delay, appellant argued that he was deprived of a direct appeal because his trial counsel failed to inform him of his right to appeal. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate sufficient cause to overcome his delay. See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

## Appendix G-2.

The federal district court found that Ground One was exhausted and Ground Two was unexhausted. The federal district court gave Collier the option of abandoning the unexhausted ground and proceeding on the remaining fully exhausted ground, or dismissing the



petition. Appendix F-4. Collier chose to abandon the unexhausted ground for relief. Appendix E-2.

The State filed an answer to the remaining ground for relief, arguing that consideration of the ground was procedurally barred and, even if not, without merit. Appendix E-2.

Collier sought leave of court to file a traverse, which was granted. Collier subsequently filed a notification to the court that he would not be filing a traverse. Instead, Collier filed a legal brief on procedural default. Appendix E-2.

The federal district court found that Ground One was procedurally barred from federal review and denied Collier's federal habeas petition. Appendix E-2.

The federal district court granted a certificate of appealability with respect to these issues:

- 1) That the procedural bar applied by the Nevada Supreme Court and relied upon by this court is inadequate to foreclose federal review; and

- 2) That Petitioner made an adequate showing of cause and prejudice to overcome the procedural bar.

Appendix C-3, C-6.

The Ninth Circuit Court of Appeals reversed the order of the federal district court and filed an opinion in which the majority of the panel concluded that, as applied, the procedural bar was not adequate to preclude federal habeas review. *Collier v. Bayer*, 408 F.3d 1279 (9th Cir. 2005). Judge Bea dissented. Appendix A. The State filed a petition for rehearing and suggestion for rehearing en banc, which was denied.

### REASONS FOR GRANTING THE WRIT

This case presents this Court with the opportunity to resolve the splits of authority between the circuits and to ascribe once and for all which party has the burden of demonstrating the adequacy or inadequacy of a state procedural bar clearly and expressly relied upon to preclude consideration of a claim or claims in a federal habeas action.

This Court has long recognized the principle that a federal court may not review a claim in a federal habeas action if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support it. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). In *Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989), this Court held that procedural default would not bar a federal review unless the last state court to enter judgment explicitly invokes or "clearly and expressly" states the judgment rests on state procedural bar and, further, state procedural default will still bar federal habeas review if the state court also reaches the merit in an alternative holding as long as procedural bar is clearly invoked as a separate basis. The adequacy of a state procedural default is itself a federal question. *Lee v. Kemna*, 534 U.S. 362, 375 (2002).

Prior decisions suggest that there is a presumption of adequacy when a state court clearly and expressly states that its judgment rests on a state procedural bar. *Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989); *Harris v. Reed*, 489 U.S.

255, 262-65 (1989); and *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). Indeed, the *Dugger* Court held the petitioner's citation to a few state cases ignoring the state procedural bar is insufficient to show inadequacy.

Relying on *Harris*, The Fifth Circuit found the existence of such a presumption. *Sones v. Hargett*, 61 F.3d 410, 416-417 (5th Cir. 1995). Relying on *Dugger*, the Fifth Circuit has found the basis for such a presumption. *Lott v. Hargett*, 80 F.3d 161, 165 (5th Cir. 1996).

The Fourth and Seventh Circuits appear to find such a presumption. *Smith v. Dixon*, 14 F.3d 956, 972 (4th Cir. 1994); *Prihoda v. McCaughtry*, 910 F.2d 1379, 1384 (1990).

However, the Ninth Circuit has stated that it ascribes no presumption of adequacy at all. *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003).

There is also a question regarding the showing by the federal habeas petitioner that is necessary to place the adequacy of the state procedural bar at issue. As noted, the

*Dugger* Court held that the petitioner's citation to a few state cases ignoring the state procedural bar is insufficient to show inadequacy. That begs the question: Just what must the petitioner do to place the question of the adequacy of a state procedural bar at issue in a federal habeas proceeding? Just exactly what quantum of proof must a petitioner present in order to demonstrate that a state procedural bar is inadequate?

The Ninth and Tenth Circuits employ a burden-shifting analysis that requires the state to plead the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner who must show, at a minimum, sufficient evidence of inconsistency by asserting specific factual allegations that demonstrate the inadequacy of the rule, and once having done so, the ultimate burden is the state's. *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003); *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999).

Furthermore, the courts are divided on the issue of which party bears the ultimate burden. For example, the Fifth Circuit places upon the petitioner the ultimate burden of demonstrating that the state procedural bar is inadequate. *Amos v. Scott*, 61 F.3d 333, 340-41 (5th Cir. 1995); *Sones*, 61 F.3d at 417. On the other hand, the Ninth Circuit has rejected the Fifth Circuit view and places upon the respondent states the ultimate burden of demonstrating the adequacy of the state procedural bar. *Bennett*, 322 F.3d at 584-86. The Tenth Circuit also places the ultimate burden on demonstrating the adequacy of a state procedural bar on the State. *Hooks*, 184 F.3d at 1217.

The Fourth and Seventh Circuits appear to place the ultimate burden upon the petitioner. *Smith*, 14 F.3d at 972; *Prihoda*, 910 F.2d at 1384.

The Second Circuit has assumed without deciding that the state bears the burden of proving the adequacy of the state procedural rule. *Cotto v. Herbert*, 331 F.3d 217, 238 (2nd Cir. 2003).

This case presents the opportunity to resolve the splits of authority identified above.

The Ninth Circuit has previously recognized the adequacy of NRS 34.726, the state procedural bar at issue in this case. *Valerio v. Crawford*, 306 F.3d 742, 778 (9th Cir. 2002) (*en banc*); *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000); *Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir. 1996). However, in this case, the Ninth Circuit failed to afford a presumption of correctness to this procedural bar under circumstances indistinguishable from *Valerio*, *Loveland*, and *Moran*, permitting the Ninth Circuit to avoid the plain language of NRS 34.726.

Indeed, the Ninth Circuit itself had already soundly rejected the argument that for a procedural bar to be “well-established” and, therefore; adequate, a state court must have already ruled that a particular attempt to circumvent that procedural bar is invalid. *Bargas v. Burns*, 179 F.3d 1207, 1211 (9th Cir. 1999). Simply because no



Nevada court had previously stated that a second motion to correct an illegal sentence does not re-start or toll the time in which to file a state habeas petition, any more than a first such motion, does not mean that the law was not well established. In this case, the Ninth Circuit wrongly presumed that that a statute is not well-established law unless a court has ruled that a statute means what it says. NRS 34.726(1) and NRAP 4(b) are both quite clear about what will toll the time to file an appeal and a habeas petition.

In 2004, the Nevada Supreme Court held that the statute of limitations for filing a state post-conviction action did not restart with the filing of an amended judgment of conviction. *Sullivan v. State*, 96 P.3d 761, 764 (Nev. 2004). Although *Sullivan* was not decided at the time Collier was convicted in 1995, NRS 34.726 was well established, having been enacted in 1991. Thus, the majority's decision conflicts with *Bargas*.



Furthermore, this case presents this Court with the opportunity to ascribe once and for all which party bears the ultimate burden of demonstrating the adequacy or inadequacy of a state procedural bar. In this case the panel majority incorrectly applied the burden of proof, even under its own precedent, because *Collier* never established the inadequacy of NRS 34.726(1). *Collier* 408 F.3d at 1284, n.6. The panel decision conflicts with *Bennett* because once the State pled the existence of an independent and adequate state procedural ground as an affirmative defense, as Respondents did in this case, the burden to place that defense in issue shifts to the petitioner. *Bennett*, 322 F.3d at 586. Under Ninth Circuit law, the petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. In Step One the state pleads a procedural bar. The burden is then shifted to the petitioner. In Step Two the

petitioner must demonstrate the inadequacy of the procedural bar, including "citation to authority demonstrating inconsistent application of the rule."

However, in this case, Collier did not allege any specific factual allegations or cite to any cases where the Nevada Supreme Court failed to apply NRS 34.726 consistently, so that one could conclude that NRS 34.726 was not "well-established." Collier has not cited any cases where the Nevada Supreme Court allowed a motion to correct an illegal sentence to re-start either the time to file an appeal or the time to file a state habeas petition. Respondents carried their burden under Step One; however, Collier failed to carry his burden under Step Two as described in *Bennett*. Contrary to the requirements of *Bennett*, the majority completely skipped Step Two.

## CONCLUSION

Petitioners respectfully request that this Court grant their petition for writ of certiorari for the reasons expressed above.

Respectfully Submitted,

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**APPENDICES  
VOLUME 1 OF 1**

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STEVEN W. COLLIER,	)	No. 04-15017
<i>Petitioner-Appellant,</i>	)	D.C. No.
	)	CV-99-00641-ECR/
vs.	)	RAM
	)	
BOB BAYER,	)	OPINION
<i>Respondents-Appellee.</i>	)	

Appeal from the United States District Court  
for the District of Nevada  
Edward C. Reed, District Judge, Presiding

Argued and Submitted  
November 4, 2004 – San Francisco, California

Filed June 3, 2005

Before: Betty B. Fletcher, Sidney R. Thomas, and  
Carlos T. Bea, Circuit Judges.

Opinion by Judge B. Fletcher  
Dissent by Judge Bea

SUMMARY

**Criminal Law and Procedure/Habeas Corpus**

The court of appeals reversed and remanded a judgment of the district court. The court held that, at the time when a Nevada state prisoner filed a motion to correct

an illegal sentence, Nevada's procedural rules governing time limits for filing a habeas corpus petition and tolling of such limits were not sufficiently well-established to preclude federal habeas review.

Petitioner-Appellant Stephen Wayne Collier pled guilty in Nevada state court to trafficking in controlled substances, and was sentenced to 45 years in prison. Collier did not file an immediate direct appeal after entry of final judgment, but he did file a motion to correct an illegal sentence, challenging his judgment of conviction for failing to list the statute under which he was sentenced, and challenging his sentence as exceeding the maximum sentence allowed under an amended, more lenient state sentencing statute. Motions to correct an illegal were not subject to the time bars and procedural hurdles governing direct appeals in Nevada. In response to Collier's motion, the state court issued an amended judgment of conviction, listing the proper statute. Collier filed a second motion to correct an illegal sentence reviving the challenge to his sentence as exceeding the maximum statutory limit. The state court rejected his challenge, concluding that the amended law did not apply to Collier. He appealed, and the Nevada Supreme Court affirmed.

Collier filed a state habeas corpus petition, which the state court dismissed for failure to comply with Nevada's one-year limit for filing a habeas petition. The Nevada Supreme Court affirmed the dismissal. He then filed a federal habeas petition, which the district court denied for failure to comply with Nevada's time limits for pursuing habeas relief.

Collier appealed.

[1] In order for a state procedural rule to preclude federal review, the rule must be clear, consistently applied, and well-established. If a state procedural rule is not well-established before a petitioner supposedly breaks the rule, then the rule cannot prevent federal review of the petitioner's federal claims. Although the state is not required to articulate every permutation of every rule, a rule held generally adequate can be deemed inadequate as applied to particular unique circumstances. Once a petitioner has demonstrated the inadequacy of a rule, the state bears the ultimate burden of proving the rule bars federal review.

[2] The state statute governing time limits for pursuing habeas relief did not distinguish between original judgments of conviction and amended judgments of conviction. Although the Nevada Supreme Court had recently held that amended judgments of conviction did not automatically restart the one-year time limit, that rule was not clearly and well-established at the time Collier filed his motion to correct an illegal sentence. [3]. Further, the Nevada procedural rule governing when the time for appeal of a civil judgment may start anew after an amended judgment did not dictate procedure for criminal habeas appeals.

[4] When Collier filed his motion to correct an illegal sentence, there was little in Nevada's state law to guide the court's understanding of whether this motion was an appeal from judgment, thus tolling the period for filing a habeas petition. Although the Nevada Supreme Court later held that only timely directed appeals qualified as appeals tolling the one-year time limit, that later decision was not determinative in this case. Collier could not be held accountable for rules established after his purported



breach. The procedural rule later announced by the Nevada Supreme Court was not clear and well-established when Collier filed his motion

Judge Bea dissented, stating that it was well-established in Nevada law that a motion to correct an illegal sentence did not either restart or toll the one-year limit for filing a habeas petition.

### COUNSEL

Franny A. Forsman and John C. Lambrose, Las Vegas, Nevada, for the petitioner -appellant.

Brian Sandoval and Robert E. Wieland, Reno, Nevada, for the respondent-appellee.

### OPINION

BETTY B. FLETCHER, Circuit Judge.

Petitioner-Appellant Stephen Wayne Collier appeals from the decision of the United States District Court for the District of Nevada, which denied his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied Collier's habeas petition for failing to comply with the State of Nevada's time limits for pursuing habeas relief. Collier challenges the adequacy of Nevada's time limit for filing habeas corpus appeals and the tolling provisions provided therein. Further, he argues cause and prejudice to excuse his purported procedural default.



We have jurisdiction pursuant to 28 U.S.C. § 2253. We reverse the district court's decision and hold that the particular application of Nevada's time limits and tolling provisions in Collier's case was not adequately established prior to his appeal. Because we reverse on this ground, we do not reach the question of whether Collier had cause or suffered prejudice.

### **Standard of Review**

Federal district court decisions denying 28 U.S.C. § 2254 habeas petitions for procedural default are reviewed *de novo*. *Fields v. Calderon*, 125 F.3d 757, 759-60 (9th Cir.1997). Factual findings underlying the decision are reviewed for clear error. *Luna v. Cambra*, 306 F.3d 954, 959 (9th Cir.2002). Mixed questions of law and fact involving constitutional issues are reviewed *de novo*. *Tomlin v. Myers*, 30 F.3d 1235, 1241 (9th Cir.1994).

### **Factual Background**

Collier pursues this habeas appeal from a judgment based on a plea and sentence of forty-five years for trafficking in controlled substances. Collier and co-defendant, Christopher Glen Hammond, pled guilty to selling methamphetamine to a government informant, Gary McConnell. Collier and Hammond sold drugs to McConnell on March 12, 1994, while McConnell was working with Nevada's Consolidated Narcotics Unit ("CNU"). McConnell worked with the CNU as part of a plea bargain for trafficking charges pending against him. During the transaction Collier gave drugs to Hammond, who then gave them to McConnell. McConnell paid for the drugs with money given him by the CNU. McConnell

testified against Collier and Hammond at their preliminary hearing on June 9, 1994.

Collier faced a several count information. He was able to negotiate a plea bargain. He pled guilty to one count of drug trafficking and he agreed to a forty-five-year prison sentence. The additional charges against Collier were dropped. Collier's co-defendant pled guilty to a similar charge and he agreed to a ten-year prison sentence.

Five days before Collier was sentenced, a new Nevada law went into effect reducing the minimum and maximum prison sentences for several criminal offenses. The sentence for the offense to which Collier pled guilty was dramatically reduced. The minimum was reduced from ten years to two years. The maximum was reduced from life to fifteen years. [FN1] This statute went into effect July 1, 1995. The revised statute does not apply to any offense committed before the effective date. 1995 Nev. Stat. ch. 443 § 393. Attempts by Collier to challenge his sentence based on the amended statute have failed.

FN1. The amended statute says: "[I]f the quantity involved ... [i]s 14 grams or more, but less than 28 grams, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years and by a fine of not more than \$100,000." Nev.Rev.Stat. 453.3385(2) (1995).

Previously, the statute read: "If the quantity involved ... is 14 grams or more, but less than 28 grams, by imprisonment in the state prison for life or for a

definite term of not less than 10 years and by a fine of not less than \$100,000." Nev.Rev.Stat. Ann. 453.3385(2) (Michie 1993).

Collier was originally represented by attorney Sferrazza. Sferrazza withdrew as counsel in early 1995 because he took a job in the public sector. The court appointed the county public defender's office to represent Collier. Three different attorneys from the public defender's office represented Collier during his preliminary hearing, plea negotiations, and sentencing. \*1282 The final attorney to represent Collier was attorney Mitchell. Mitchell appeared with Collier at his July 5, 1995 sentencing. Mitchell had previously represented McConnell, the government's informant, and had helped McConnell negotiate a plea against several drug trafficking charges in early 1994. As part of the plea bargain, McConnell pled guilty to one count of drug trafficking. The plea resulted in several charges being dropped and the suspension of a five-year prison sentence and \$50,000 fine. McConnell was placed on probation for three years. The transcript of the sentencing proceedings is sealed. Shortly after accepting this plea deal, McConnell was involved with the CNU operation that resulted in Collier's arrest.

### **Procedural History**

#### **A. Proceedings in state court**

Collier did not file an immediate direct appeal after entry of the final judgment against him. He did, however, file a motion to correct an illegal sentence on

March 21, 1997 under Nev.Rev.Stat. 176.555 (2004). [FN2] He challenged his judgment of conviction for failing to list the statute under which he was sentenced and he challenged his sentence as exceeding the maximum statutory limit for convictions under Nevada's revised sentencing statute, Nev.Rev.Stat. 453.3385(2). The Nevada state district court issued an amended judgment of conviction, listing the proper statute, on March 26, 1997. The amended judgment did not change the sentence. A few months later, Collier filed a second motion to correct an illegal sentence reviving the challenge to his sentence as exceeding the maximum statutory limit. The state district court considered the merits of this motion and held the amended law did not apply to Collier. He appealed. Two years later, the Nevada Supreme Court denied Collier's appeal on the merits, affirming the state district court. [FN3] The remittitur issued on June 9, 1999.

FN2. In Nevada motions to correct an illegal sentence are a post-conviction remedy available to correct a facially illegal sentence. See *Pangallo v. State*, 112 Nev. 1533, 930 P.2d 100, 102 n. 2 (1996); *Edwards v. State*, 112 Nev. 704, 918 P.2d 321, 323-24 (1996). Motions to correct an illegal sentence (and similar appeals) occur after a conviction and sentencing but they are not collateral attacks. *Passanisi v. State*, 108 Nev. 318, 831 P.2d 1371, 1373 (1992).

Motions to correct an illegal sentence are not subject to the time bars and procedural hurdles limiting other types of appeals. The Nevada Supreme Court said, "Because of the very nature of the remedy sought in a motion for relief from a sentence that is either facially illegal or is the result of a mistaken assumption regarding a criminal defendant's record, time constraints and procedural defaults necessarily do not apply." *Edwards*,

918 P.2d at 324. Collier's motions to correct an illegal sentence were properly filed and were considered on the merits by the Nevada state courts.

FN3. During this same time, Collier filed a belated direct appeal. This appeal was dismissed by the Nevada Supreme Court for lack of jurisdiction due to timeliness.

After the Nevada Supreme Court denied Collier's motion but before the remittitur issued, he filed a state habeas petition on May 28, 1999. The state district court dismissed the habeas petition as untimely, saying the petition violated the one-year time limit for filing habeas appeals. *See Nev.Rev.Stat. 34.726(1).* Collier appealed to the Nevada Supreme Court. The Nevada Supreme Court affirmed.

#### B. Proceedings in federal court

Collier filed a federal habeas petition in the Nevada federal district court on June 30, 2000. The district court dismissed the petition as mixed (including both exhausted and unexhausted claims), but gave Collier an opportunity to amend his petition. He abandoned the unexhausted claims and pursued only those claims the district court deemed exhausted. The district court denied Collier's habeas petition as barred by Nevada's procedural rule that habeas petitions must be filed within one year of the judgment of conviction or within one year of the Nevada Supreme Court's remittitur from an appeal from judgment. *See Nev.Rev.Stat. 34.726(1).* The district court found Nevada's rule was adequate and independent and that Collier failed to show cause and prejudice for the default. Collier then petitioned for and received a certificate of appealability. The district court

found Collier had "raised a valid showing of the denial of a constitutional right" for ineffective assistance of counsel. The district court also found the adequacy of Nevada's procedural rule "could be debatable among jurists of reason."

### **Analysis**

The State of Nevada requires habeas petitions to be filed within one year of the state supreme court's remittitur in an appeal taken from judgment. Nev.Rev.Stat. 34.726(1). In this case, the trial court amended Collier's final judgment on March 26, 1997. After the amendment, Collier continued to pursue relief through a properly filed motion to correct an illegal sentence. The motion was denied and Collier appealed to the Nevada Supreme Court. The Nevada Supreme Court denied Collier's appeal on the merits on May 13, 1999. Immediately thereafter, on May 28, 1999, Collier filed a state habeas petition. The remittitur from the Nevada Supreme Court's order issued on June 9, 1999.

On the face of Nevada's statute limiting the time to file for habeas corpus relief, Collier's state habeas petition conforms with the state's one year time limit. See Nev.Rev.Stat. 34.726(1). Collier filed his habeas petition within one year of the state supreme court's remittitur on his appeal. The Nevada Supreme Court, however, interpreted the law differently in Collier's case. The Nevada Supreme Court said Collier's state habeas petition was not timely filed under Nev.Rev.Stat. 34.726(1), thus denying Collier's habeas petition on state procedural grounds. [FN4] Collier argues this procedural rule was not adequately established prior to his appeal.



He argues the rule cannot bar his pursuit of federal habeas relief. The Respondent disagrees.

FN4. Federal courts of appeal may not review state courts' interpretations of state law. The Supreme Court said, "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67- 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Thus, we defer to the state court's interpretation of state law.

We conclude that the rule was not adequately established prior to Collier's appeal. We find nothing in either the plain language of Nev.Rev.Stat. 34.726 or the Nevada courts' interpretation of that statute to suggest that an amended judgment would not entitle Collier to a new one year time period to pursue habeas relief. Furthermore, there is no established rule that motions to correct an illegal sentence do not qualify as an appeal from judgment, thus tolling the period for filing a habeas petition.

#### A. Adequate and independent state grounds

For a state procedural rule to prevent federal review of federal claims, the state's rule must be both adequate and independent. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The Supreme Court has held in the habeas context that "this Court will not review a question of federal law decided

by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Id.* The Court explained, "The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Id.* at 729-30.

[1] In order for a state procedural rule to preclude federal review, the rule must be "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). The Ninth Circuit has elaborated that "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir.1996) (quoting *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir.1994)). [FN5] If a state procedural rule is not well-established before a petitioner supposedly breaks the rule, then the rule cannot prevent federal review of the petitioner's federal claims. Although the state is not required "to articulate every permutation of every rule," *Bargas v. Burns*, 179 F.3d 1207, 1213 (9th Cir.1999), a rule held generally adequate can be deemed inadequate as applied to particular unique circumstances, *Lee v. Kemna*, 534 U.S. 362, 376, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002). Once a petitioner has demonstrated the inadequacy of a rule, the state bears the ultimate burden of proving the rule bars federal review. *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir.2003). [FN6]

[FN5]. The dissent argues that the petitioner must cite cases in which a procedural bar is applied inconsistently. Dissent at 6245. Inconsistency is only one aspect of the principle that a state's procedural bar must be adequate. This court has repeatedly said the state's rule must be



clear, consistently applied, and well-established. See e.g., *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9th Cir.2004); *Melendez v. Warden*, 288 F.3d 1120, 1122 (9th Cir.2002); *Jackson v. Calderon*, 211 F.3d 1148, 1153 (9th Cir.2000). The emphasis in the case before us is whether the rule was well-established. We, obviously, do not require a habeas petitioner to show inconsistency in application when the problem with the rule is that the rule is not clear or well-established and has never been applied to the unique circumstances of his case.

FN6. The Ninth Circuit explained the state's burden for proving the adequacy of a state rule, saying:

Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

*Powell v. Lambert*, 357 F.3d 871, 875 (9th Cir.2004) (quoting *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir.2003)).

This standard for determining the adequacy of state procedural bars is well-established in federal habeas law. The dissent accuses the majority of creating "a

radical new rule of law which shifts the burden of proof from the prisoner to the State." Dissent at 1289. The dissent confuses a disagreement over the interpretation of Nevada state law with a conflict over the federal habeas standard. In this opinion we hold that Collier met his burden by establishing that no state rule was adequately established to bar his state habeas petition. Only then do we shift the burden to the state, as the standard demands. This is merely an application of the federal habeas standard as it stands today. This holding makes no new habeas law. State procedural rules must also be independent to preclude federal review. As Collier challenges only the adequacy of Nevada's procedural rule, not its independence, we do not address the independence prong.

The Nevada procedural rule at issue is a one-year time limit for filing a habeas corpus petition. The relevant law states:

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment of sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(a) That the delay is not the fault of the petitioner; and

(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

Nev.Rev.Stat. 34.726(1). This court previously found that the Nevada Supreme Court generally applies this time limit consistently to habeas petitions. See, e.g., *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir.2000); *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir.1996). The adequacy of this general time bar, however, is not at issue here. The issues for review are specific to the application of this rule in Collier's case. First, was it clear and well-established in Nevada law that the original judgment, not the amended judgment of conviction starts the one-year time limit? Second, was it clear and well-established in Nevada law that a motion to correct an illegal sentence does not toll the one-year time limit?

B. Amended judgments

[2] The plain language of Nev.Rev.Stat. 34.726(1) does not distinguish between original judgments of conviction and amended judgments of conviction. Until recently, there was little in Nevada statutory or case law to offer guidance on this issue. [FN7] Then, on September 3, 2004, the Nevada Supreme Court published an opinion holding that amended judgments of conviction do not automatically re-start the time clock under Nev.Rev.Stat. 34.726(1). *Sullivan v. Nevada*, 96 P.3d 761, 764 (Nev.2004). Instead, an amended judgment of conviction may, if proved, qualify as "good cause" under Nev.Rev.Stat. § 34.726(1)(a), thus allowing for additional appeals. *Id.* The Nevada Supreme Court said:

FN7. In 1888, the Nevada Supreme Court denied a motion for a new trial in a civil case where the trial court's clerk had entered the wrong name on the judgment. *Burbank v. Rivers*, 20 Nev. 159, 18 P. 753 (1888). The Nevada Supreme Court found the clerical error did not extend the time for filing an appeal. *Id.* at 755. The court said that to prevail on such a basis, the petitioner must "affirmatively show, to the satisfaction of this court, that he was deceived or misled by the entry as made." *Id.* *Burbank* is not instructive in the case before us. First, the amendment to Collier's judgment was not a clerical error. The trial court failed to include the basis for the judgment: the statute under which Collier was sentenced. Second, the *Burbank* case is not cited by the state courts as grounds for the state courts' opinions in this case. The *Burbank* rule (if such a rule exists) is not at issue here. Finally, the *Burbank* case has not been cited by a Nevada state court since 1921. See *Bottini v. Mongolo*, 45 Nev. 245, 197 P. 702, 704 (1921). Nowhere is it cited in the State's briefing materials. The dissent's shaking the dust off a century old rule, not used by the state courts in eighty years, does not establish the rule as adequate under federal habeas law. We do not reject the rule because it is old, we reject it because it is not well-established.

We emphasize, however, that the entry of an amended judgment may in and of \*1286 itself provide the good cause required by that statute to present appropriate post-conviction claims relating to the amendment at issue. In other words, if the claims presented in a petition filed within one year of the entry of the amended judgment challenge the proceedings leading to a substantive

amendment of the judgment and could not have been raised in prior proceedings, there may be no delay attributable to the "fault of the petitioner."

*Id.* As *Sullivan* was decided only recently, such a rule cannot be held clearly and well-established at the time Collier filed his motion to correct an illegal sentence in 1997. Notably, the Nevada Supreme Court does not cite a single statute, rule, or case standing for the proposition that amended judgments of conviction do not automatically re-start the one-year time clock under Nev.Rev.Stat. 34.726(1). The two cases noted in the discussion, *Dickerson v. State*, 114 Nev. 1084, 967 P.2d 1132 (1998) and *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001), are cited only to illustrate the legislature's general intent in enacting Nev.Rev.Stat. 34.726(1). *Sullivan*, 96 P.3d at 764 nn. 7 & 10-11. There is scant evidence that amended judgments of conviction did not re-start the one-year clock at the time of Collier's default.

[3] The dissent would give substantial weight to *Morrell v. Edwards*, 98 Nev. 91, 640 P.2d 1322 (1982). In that case, the Nevada Supreme Court created a rule governing when the time for an appeal in the *civil* context may start anew after an amended judgment. The court stated that whether "an appeal is properly taken from an amended judgment rather than the judgment originally entered depends upon whether the amendment disturbed or revised legal rights and obligations which the prior judgment had plainly and properly settled with finality." *Id.* at 1324. The Nevada Supreme Court has never applied this standard in a criminal case. The standard for criminal cases, as established in 2004, is

whether the issues presented in the appeal relate to a substantive change in the amended judgment. *Sullivan*, 96 P.3d at 764. Rules for civil appeals do not dictate procedure for criminal habeas appeals. The Nevada Supreme Court has specifically said, "this court has consistently and repeatedly held that rules of civil appellate procedure are not applicable to appeals from statutory post-conviction habeas corpus proceedings." *Klein v. Warden*, 118 Nev. 305, 43 P.3d 1029, 1033 (2002). The rule establishing when amended judgments allow a new period to file habeas appeals was decided by the Nevada Supreme Court's holding in *Sullivan* in 2004. [FN8] Because this rule was not adequately established, if at all, prior to 2004, it cannot bar federal habeas review in Collier's case. [FN9]

FN8. The first footnote of the Nevada Supreme Court's opinion states that the court had previously disposed of the case in an unpublished disposition on March 5, 2004. The government then filed a motion seeking publication of the decision. "Cause appearing, [the Court granted] the State's motion to publish." *Sullivan*, 96 P.3d at 762 n. 1. The cause for publication is not mentioned. Given the lack of guidance on this issue in prior opinions, the need for publication is consistent with the need to establish the rule.

FN9. The dissent suggests that because Collier cannot show cases illustrating an inconsistent application of such a rule Collier's claim fails. Dissent at 1292. The dissent completely ignores the well-established prong of the standard for determining adequacy. *See supra* at 1294-95. Collier has shown this state procedural rule did not exist prior to 2004 and the government has failed its burden to show it was adequately established.



### C. Motions to correct an illegal sentence

[4] The second procedural rule at issue is whether a motion to correct an illegal sentence tolls the one-year clock under Nev.Rev.Stat. 34.726(1). The question is whether a motion to correct an illegal sentence is an "appeal ... from the judgment" as stated in Nev.Rev.Stat. 34.726(1). Collier's motions to correct an illegal sentence were properly filed under Nevada state law. The state district court considered Collier's first motion and amended his judgment of conviction. Both the Nevada district court and the Nevada Supreme Court considered his second motion and denied it on the merits. Collier filed his federal habeas petition after the Nevada Supreme Court's remittitur on his state habeas petition. When Collier filed his motion to correct an illegal sentence, there was little in Nevada's state law to guide the courts' understanding of whether these motions are an appeal from judgment, thus tolling the period for filing a habeas petition under Nev.Rev.Stat. 34.726(1). Then, after Collier filed his motion to correct an illegal sentence, the Nevada Supreme Court gave form to these words in *Dickerson v. State*, 967 P.2d at 1133-34. There the court held only timely direct appeals qualified as appeals tolling the one-year time limit. [FN10] *Id.* The Court held:

FN10. Because the *Dickerson* case was decided after Collier filed his motion to correct an illegal sentence, it is not determinative in this case. Thus we need not explore whether under Nevada state law motions to correct an illegal sentence are direct appeals.

We now construe [Nev.Rev.Stat.] 34.726(1) to mean that the one-year period



for filing a post-conviction habeas corpus petition begins to run from the issuance of the remittitur from a timely direct appeal to this court from the judgment of conviction or from the entry of the judgment of conviction if no direct appeal is taken. A *timely* direct appeal is one in which the notice of appeal is filed with the district court within the time period prescribed by statute.

*Id.* *Dickerson* was decided in 1998 and Collier filed his motion to correct an illegal sentence in 1997. [FN11] Collier cannot be held accountable for rules established after his purported breach. See *Ford v. Georgia*, 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991); *Petrocelli v. Angelone*, 248 F.3d 877, 885 (9th Cir.2001).

FN11. The dissent relies heavily on *Dickerson*, 114 Nev. 1084, 967 P.2d 1132, and the NRAP 4(b). Dissent at 1298-99. Neither is controlling here. *Dickerson* was decided after Collier's purported breach. NRAP 4(b) established tolling mechanisms for *direct* appeals, not habeas appeals. It is inapplicable to the question of whether a motion to correct an illegal sentence tolls the time period for filing a habeas appeal. Furthermore, NRAP 4(b) does not govern motions to correct an illegal sentence. Such motions, as the Respondent and the dissent concede, need not be filed within thirty days of judgment as NRAP 4(b) requires. Collier's motions to correct an illegal sentence were timely and were addressed on the merits by the Nevada courts.

The government concedes it was in *Dickerson* where the tolling provisions in Nev.Rev.Stat. 34.726(1)

were narrowed to apply only to a "timely direct appeal." *Dickerson*, 967 P.2d at 1133. Nonetheless, the government argues such a rule "necessarily follows" from a prior Nevada Supreme Court decision in *Edwards v. State*, 112 Nev. 704, 918 P.2d 321 (1996). In *Edwards*, the Nevada Supreme Court explained that motions to correct an illegal sentence are special because they attack a sentence that is "either facially illegal or is the result of a mistaken assumption regarding a criminal defendant's record, time constraints and procedural defaults necessarily do not apply." *Id.* at 324. The Nevada Supreme Court's discussion of motions to correct an illegal sentence (and like appeals) in *Edwards* emphasizes that these motions are free from the various constraints and time limits restricting access to other appeals. In particular these motions are exempted from the limitations \*1288 on habeas petitions. *Id.*; Nev.Rev.Stat. 34.724(2)(a). Suggesting it "necessarily follows" from the discussion in *Edwards* that motions to correct an illegal sentence (and similar motions) limit an individual's ability to pursue habeas relief completely mischaracterizes the *Edwards* opinion. The Nevada Supreme Court's emphasis in *Edwards* is on narrowly defining this type of appeal while emphasizing broad access to it. Petitioners suffering under the errors challenged by motions to correct an illegal sentence are free of the procedural hurdles placed on other types of appeals. It is disingenuous to suggest *Edwards* interpreted the phrase "an appeal has been taken from the judgment" in Nev.Rev.Stat. 34.726(1) to exclude motions to correct an illegal sentence. The Nevada Supreme Court considered no such question. Twisting the court's words to create such a meaning does not establish a clear, consistently applied, and well-established rule.

Today, because of the *Dickerson* decision, the confusion present during Collier's appeal does not exist. [FN12] Defendant-Appellants know they may pursue habeas relief only within one year "from the issuance of the remittitur from a timely direct appeal to this court from the judgment of conviction or from the entry of the judgment of conviction if no direct appeal is taken." *Dickerson*, 967 P.2d at 1133-34.

FN12. The dissent suggests that every prisoner in Nevada convicted prior to September 3, 2004 will be able to file a meritless motion to correct an illegal sentence en route to filing a state habeas petition. Dissent at 1289-90. This assertion is unwarranted. In this case, the petitioner's motion to correct an illegal sentence was granted and he filed his second motion to correct an illegal sentence within the one-year period for filing an appeal. His motions were properly filed and considered on the merits by the Nevada state courts. If a person were able to replicate this unlikely pattern and they were convicted prior to the Nevada Supreme Court's opinion in *Dickerson v. Nevada*, 114 Nev. 1084, 967 P.2d 1132 (1998) (holding motions to correct an illegal sentence are not an appeal from a judgment) then they could and should be able to file their habeas appeal. No state rule was established to the contrary prior to the *Dickerson* opinion.

### Conclusion

The Nevada procedural rules applied by the Nevada state courts to bar Collier's habeas petition are not adequate to preclude federal review of his habeas petition. The rules applying Nev.Rev.Stat. 34.726(1) were not clear, consistently applied, and well-established at the

time of Collier's purported default. When Collier filed his motion to correct an illegal sentence in 1997 and subsequent habeas petitions, it appeared under state law a habeas petition could follow a remittitur from such an appeal and amended judgment. The district court's opinion is reversed and the appeal is remanded for consideration on the merits.

### REVERSED AND REMANDED.

BEA, Circuit Judge, dissenting:

I respectfully dissent because the majority's opinion allows a petitioner for writ of habeas corpus to mock the Nevada statutory deadline for filing a habeas petition from a judgment of conviction, simply by filing one or any number of motions to correct an illegal sentence, no matter how meretricious the motions. Henceforth, any prisoner convicted before the effective date of *Sullivan v. Nevada*, 96 P.3d 761 (Nev.2004)—September 3, 2004—will be able to file a baseless motion to correct an illegal sentence as a prelude to filing a Nevada state habeas petition on the ground that the denial of his motion to correct an illegal sentence creates a one-year opportunity to file a habeas petition. I disagree with the majority's analysis on three major points.

First, it was well-established in Nevada law that a motion to correct an illegal sentence did not either re-start or toll [FN1] the one-year time limit in which to file a habeas petition under Nevada Revised Statutes ("NRS") § 34.726(1). The majority opinion confuses appeals and habeas petitions, both of which are used to attack the merits of a judgment of conviction, with a motion to

correct an illegal sentence, which is used only when the judgment contains a sentence that is invalid under the statutory sentencing scheme, or when the district court sentenced the defendant based on a misunderstanding of the defendant's prior criminal record. Just as important, there is no basis in the language of Nev. Rev. Stat. § 34.726(1) to conclude that a motion to correct an illegal sentence either re-starts or tolls the time in which to file a state habeas petition.

FN1. This is not to suggest that Collier's motions to correct an illegal sentence were filed during the one-year period when there was time to "toll," i.e. stop the running of the time to file a habeas petition. Indeed, the one year had run *both* from the judgment (July 5, 1995) and the amended judgment (March 26, 1997), when Collier filed his habeas petition on May 28, 1999.

Second, the majority opinion arrives at its conclusion by placing the burden on the State to cite this court to a prior case in which Collier's precise argument was rejected by the Nevada Supreme Court to prove that Nevada's one-year time limit to file a habeas petition under NRS § 34.726(1) was well-established law. This is a radical new rule of law which shifts the burden of proof from the prisoner to the State, without the benefit of an *en banc* or Supreme Court ruling that mandates such a burden shift. Heretofore, where the State has pleaded a procedural bar and the defendant challenges the adequacy of a State's procedural bar, it is first the petitioner's burden to prove the procedural bar is inadequate. *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir.2003). Only if the petitioner proves the procedural bar is inadequate does the burden then shift

to the State to prove the procedural bar is adequate. Here, Collier failed in his initial burden of proof. The majority opinion now relieves petitioners of that burden.

Further, the majority presumes that a statute is not well-established law unless a court has ruled that the statute means what it says. This ruling will lead to all sorts of mischief. Habeas petitioners have a duty to follow the plain language of a State's procedural rules, even where no State court has yet rejected the precise attempt made by the petitioner to circumvent those rules. *Bargas v. Burns*, 179 F.3d 1207, 1211 (9th Cir.1999). Third, even if the *amended* judgment of conviction did start anew the time period in which Collier could file an appeal, which I contend it could not, Collier's habeas petition was filed more than one year after the date of entry of the *amended* judgment of conviction. Hence, Collier's habeas petition was still barred under NRS § 34.726(1). The only way Collier's appeal from the amended judgment of conviction could be timely is if his *second* motion to correct an illegal sentence re-started the time for him to appeal from the amended judgment. Of course, a motion to correct an illegal sentence cannot revive the time in which to appeal after that time has run out; is also not one of the few motions which toll the time in which to appeal a judgment of conviction in a criminal case under Nevada Rule of Appellate Procedure 4(b).

### I. Procedural History

The precise chronology of events is important in this case. On May 17, 1995, Collier pleaded guilty to



Count I of the Amended Information, which charged him with violating NRS §§ 453.3385 and 453.3405 for possession of a trafficking quantity of a controlled substance. Collier and the State entered into a plea bargain in which Collier agreed to a 45-year sentence. In exchange, the district attorney dismissed the other ten charges filed against Collier. [FN2]

FN2. Collier had been charged with eleven drug trafficking offenses. After Collier's arrest, a substantial amount of methamphetamine, ephedrine, and marijuana was found in Collier's storage shed, along with 50 weapons and narcotics paraphernalia. I add these details lest a reader of the majority opinion come away with the impression that Collier was an unfortunate bystander who infelicitously fell captive to the wares of a government plant.

At the time Collier entered his plea, the maximum sentence under NRS § 453.3385 for a drug trafficking offense was life in prison and a \$100,000 fine. Nev. Rev. Stat. § 453.3385(2) (1993). Five days before Collier was sentenced, the Nevada legislature changed the law, and the maximum sentence became fifteen years. Nev. Rev. Stat. § 453.3385(2)(1995). The new version of NRS § 453.3385(2) specifically stated, however, that it did *not* apply to any offense committed before its effective date of July 1, 1995. *Id.* The Amended Information, to which Collier pleaded guilty, stated that Collier committed a violation of NRS § 453.3385 on March 12, 1994, over a year before the effective date of the new statute. Therefore, the amended statute did not apply to Collier's case.



Collier was sentenced in accordance with the plea agreement, and a final judgment of conviction was entered against him on July 5, 1995. The judgment stated that Collier was guilty of Count I of the Amended Information and the court sentenced him to 45 years imprisonment and assessed a \$100,000 fine.

Collier then had 30 days to file an appeal attacking his judgment of conviction or to extend the 30-day period by filing one or more specific motions which, under NRAP 4(b), serve to toll the running of that 30-day period:

In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the entry of the judgment or order appealed from.... If a timely motion in arrest of judgment [FN3] or for a new trial on any ground other than newly discovered evidence [FN4] has been made, an appeal from a judgment of conviction may be taken within thirty (30) days after entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within thirty (30) days after entry of the judgment....

FN3. A motion in arrest of judgment must be filed within 7 days after a determination of guilt or within such further time as the court may fix during the 7-day period. Nev. Rev. Stat. § 176.525 (1995).

FN4. A motion for a new trial that is not based on newly discovered evidence must be filed within 7 days after the verdict or finding of guilt. Nev. Rev. Stat. § 176.515 (1995).

Nev. R. App. P. 4(b)(1)(1995).

Collier did not file a direct appeal within 30 days after the entry of the judgment of conviction, nor did he file either a motion in arrest of judgment or a motion for new trial. Therefore, the right to appeal his judgment of conviction expired on August 4, 1995.

Because Collier did not file a timely appeal, he then had one year after the entry of his judgment of conviction to file a habeas petition under Nevada law:

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(a) That the delay is not the fault of the petitioner; and

(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

Nev. Rev. Stat. § 34.726(1) (1995). Collier failed to file a habeas petition by July 5, 1996. His right to file a habeas petition expired on that date, absent good cause for the delay.

On March 21, 1997, over 8 months after his appeal and habeas opportunities had expired because of the passage of time, Collier filed a *pro se* motion to correct an illegal sentence under NRS § 176.555. In his motion, Collier set forth the language of Count I to which he had pleaded guilty. He moved the court to amend the judgment to include the statute numbers to which he pleaded guilty, NRS §§ 453.3385 and 453.3405. [FN5] As a second ground for his motion, Collier quoted the revised version of NRS § 453.3385 and moved the court to limit his sentence to 2 years, down from the 45 years he agreed to earlier. Collier did not claim that he was ever confused as to the statute under which he was convicted. The statutes were spelled out in the Amended Information and plea agreement, and Collier himself set them forth in his motion to correct an illegal sentence.

FN5. Why this punctiliousness? Perhaps Collier thought that if he got the court to put in the statute number he could argue the now *revised* statute would apply and he was being held illegally. He was conveniently forgetting that the revised statute, by its own terms, did not apply to crimes committed before its effective date of July 1, 1995.

Since Collier committed the offense on March 12, 1994, regardless whether the statute number was listed in his judgment, the revised statute does not apply to Collier's case. But one must remember, Collier was acting *pro se*.

On March 26, 1997, the Nevada state district court issued an amended judgment of conviction, in effect granting his motion that the judgment recite the statute numbers under which he was convicted. The amended judgment now specified that Collier had been found guilty of NRS §§ 453.3385 and 453.3405. The court did not, March 26, 1997. Collier did not file a habeas petition before March 26, 1998.

FN6. This is precisely in keeping with the Nevada Supreme Court's ruling in *Burbank v. Rivers*, 20 Nev. 159, 18 P. 753, 755 (1888), discussed *infra*. The date of the judgment does not change when it is amended to correct a clerical mistake, as was the case here.

On May 20, 1997, Collier filed a second *pro se* motion to correct an illegal sentence based on the same grounds as his first motion to correct an illegal sentence. [FN7] however, grant the second part of his motion; it refused to reduce Collier's sentence by 43 years. As the majority correctly noted, "the amended judgment did not change the sentence." Maj. Op. at 6221. In fact, the amended judgment of conviction even kept the original date: "Dated this 5th day of July, 1995." [FN6] Collier neither moved for reconsideration of his motion nor did he appeal the district court's failure to rule on his motion to limit his sentence to 2 years, or any other aspect of the amended judgment entered on

FN7. The majority claims Collier filed this second motion "reviving" his claims asserted in his March 21, 1997 motion. Maj. Op. at 1282. To repeat is not to revive. His earlier claim had been denied; it was final. The repetition of his claim did not "relate back" or otherwise seek a reconsideration of his earlier motion. It was just a second attempt.

On May 28, 1997, the Nevada state district court denied Collier's second motion to correct an illegal sentence. The district court specifically denied Collier's motion on the merits because, by its terms, the revised version of NRS § 453.3385 did not apply to his case. This time, Collier timely appealed the district court's order denying his second motion to correct an illegal sentence on June 10, 1997.

On November 16, 1998, Collier filed a notice of appeal from his original judgment of conviction, claiming his appeal was untimely because his trial counsel did not inform Collier he had a right to appeal. The Nevada Supreme Court dismissed Collier's appeal as untimely under NRAP 4(b) on February 3, 1999. [FN8]

FN8. The Nevada Supreme Court had no power to enlarge the time for Collier to file his direct appeal. Nev. R. App. P. 26(b) (1995); *Walker v. Scully*, 99 Nev. 45, 657 P.2d 94 (1983). Neither could the court have extended the time for Collier to file either a motion in arrest of judgment or a motion for new trial to toll the time to file an appeal. Nev. Rev. Stat. § 178.476 (1995); *Culinary & Hotel Serv. Workers Union v. Haugen*, 76 Nev. 424, 357 P.2d 113 (1960) (court did not have power to extend time to file motion for new trial, even pursuant to a stipulation between the parties, and thus the notice of appeal was untimely).

On May 13, 1999, the Nevada Supreme Court affirmed the district court's order denying Collier's second motion to correct an illegal sentence. The remittitur was issued on June 11, 1999.

On May 28, 1999, Collier filed a *pro se* petition for writ of habeas corpus in the Nevada state district court, seeking to have all charges against him dismissed. Collier again claimed his trial counsel failed to inform him that he had a right to file a direct appeal. On August 20, 1999, the Nevada state district court dismissed Collier's habeas petition as untimely under NRS § 34.726(1). It also held that Collier failed to show good cause for the untimeliness of the petition. On September 1, 1999, Collier appealed from the state district court's denial of his habeas petition to the Nevada Supreme Court.

While Collier's appeal from the denial of his state habeas petition was pending, he filed a habeas petition in federal district court through counsel on June 30, 2000. On August 28, 2001, the Nevada Supreme Court affirmed the district court's denial of Collier's state habeas petition, holding that his petition was untimely under NRS § 34.726(1).

On March 28, 2003, the federal district court denied Collier's federal habeas petition, holding that the dismissal of Collier's state habeas petition under NRS § 34.726(1) precluded federal habeas review because NRS § 34.726(1) was an independent and adequate state procedural bar [FN9] and Collier failed to show good cause for the untimeliness of his state habeas petition. This timely appeal followed.



FN9. For a state procedural bar to be an independent and adequate ground sufficient to support a finding of procedural default, the rule must be "clear, consistently applied, and well-established at the time of petitioner's purported default." Wells v. Maass, 28 F.3d 1005, 1008 (9th Cir.1994). A state procedural rule is adequate if the state courts follow it "in the vast majority of cases." Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir.1996) (citation omitted).

## **II. Standard of Review**

We review *de novo* the district court's decision to deny a 28 U.S.C. § 2254 habeas petition. Nunes v. Mueller, 350 F.3d 1045, 1051 (9th Cir.2003). We review findings of fact made by the district court for clear error, and "may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale." *Id.*

## **III. Analysis**

### **A. Under the Plain Language of NRS § 34.726(1) a Motion to Correct an Illegal Sentence Does Not Re-Start or Toll the Time in Which to File a Habeas Petition**

Regardless whether the original or amended judgment of conviction is the relevant judgment, Collier's state habeas petition, filed on May 28, 1999, was untimely under NRS § 34.726(1) because it was filed more than one year after the original judgment was entered on July 5, 1995, and more than one year after the amended judgment was entered on March 26, 1997, neither of which did Collier timely appeal.



The Nevada Supreme Court has stated that a motion to correct an illegal sentence is to be used only when the judgment contains a sentence that is invalid under the statutory sentencing scheme, or is based on the district court's misunderstanding of the defendant's criminal record. *Edwards v. State*, 112 Nev. 704, 918 P.2d 321, 324-25 (1996).

Here, Collier properly filed a motion to correct an illegal sentence given that his argument was that his judgment of conviction failed to recite the statute numbers under which he was convicted and his sentence exceeded the statutory maximum. I agree that he was able to file such motion at any time. Nev. Rev. Stat. § 176.555 (1995). But this is a very different proposition from saying that a motion to correct an illegal sentence also re-starts or tolls the time in which to file a habeas petition, which must be filed within one year.

First, a motion to correct an illegal sentence and a habeas petition are entirely different remedies with different purposes. Collier's motion to correct an illegal sentence did not raise the question whether he was justly convicted. Collier had pleaded guilty. The motion raised only the question whether Collier was correctly sentenced for his crime.

On the other hand, a habeas petition is used to attack the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing. *Edwards*, 918 P.2d at 324-25. A judgment of conviction encompasses not only a sentence, but also a finding of guilt. There are important reasons why the Nevada legislature has limited the time in which a judgment of conviction can be attacked collaterally. Witnesses die, move away, or forget; evidence is lost. Witnesses and

evidence are irrelevant to a motion to correct a sentence, particularly where the sentence is negotiated, and imposed following a guilty plea. That is why timing is important to a habeas petition, but irrelevant to a motion to correct a sentence.

Second, under Nevada law a motion to correct an illegal sentence does not re-start or toll the time in which to file a habeas petition. Indeed, in *Edwards*, the Nevada Supreme Court specifically disapproved of the very tactic Collier is attempting to use here:

We have observed that defendants are increasingly filing in district court documents entitled "motion to correct illegal sentence" or "motion to modify sentence" to challenge the validity of their convictions and sentences in violation of the exclusive remedy provision detailed in NRS 34.724(2)(b), in an attempt to circumvent the procedural bars governing post-conviction petitions for habeas relief under NRS chapter 34. We have also observed that the district courts are often addressing the merits of issues regarding the validity of convictions or sentences when such issues are presented in motions to modify or correct allegedly illegal sentences without regard for the procedural bars the legislature has established. If a motion to correct an illegal sentence or to modify a sentence raises issues outside of the very narrow scope of the inherent authority recognized in this

Opinion, the motion should be summarily denied.

*Id.* at 325 n. 2. The majority incorrectly characterizes the holding of *Edwards*. It is true that motions to correct an illegal sentence can be filed at any time. But the filing of a motion to correct an illegal sentence does not revive, nor toll, the time in which to file a habeas petition.

Further, in *Sullivan v. Nevada*, 96 P.3d 761 (Nev.2004), the Nevada Supreme Court considered a case that involved an amended judgment and held:

No specific language in NRS 34.726 expressly provides that the one-year time period restarts if the judgment of conviction is amended.

Moreover, construing NRS 34.726 to provide such an extended time period would result in an absurdity that the Legislature could not have intended. [FN10] A judgment of conviction may be amended *at any time* to correct a clerical error [under NRS § 176.565] or to correct an illegal sentence [under NRS § 176.555]. Because the district court may amend the judgment many years, even decades, after the entry of the original judgment of conviction, restarting the one-year period for all purposes every time an amendment occurs would frustrate the purpose and spirit of NRS 34.726. Specifically, it would undermine the doctrine of finality of judgments by allowing

petitioners to file post-conviction habeas petitions in perpetuity.

FN10. The court in *Sullivan* was referring to precisely the "absurdity" the majority embraces today and enacts for all Nevada convictions earlier than *Sullivan*, *supra*.

*Id.* at 764 (footnotes eliminated).

The majority holds that because no Nevada court before *Sullivan* had ruled that the plain language of NRS § 34.726(1) means what it says, a petitioner could well believe that a motion to correct an illegal sentence would re-start the time in which to file a habeas petition; hence, according to the majority, the one-year time period of NRS § 34.726(1) was not "well-established" until *Sullivan*. While this argument might have some merit if the language of NRS § 34.726(1) were ambiguous and might allow one to interpret it in the manner Collier does, the language of the statute is not ambiguous. See *supra* p. 6221. In ruling that the very argument proposed by Collier "would result in an absurdity that the Legislature could not have intended," the court in *Sullivan* was interpreting what the legislature intended when NRS § 34.726(1) was enacted. The meaning derived is not new; it has always been there. See, e.g., *Bousley v. United States*, 523 U.S. 614, 633, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) ("It is well established that 'when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law.' ") (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313, n. 12, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994)); *Schwenk v. Hartford*, 204 F.3d 1187, 1204 (9th Cir.2000) ("It is well-established that acts of Congress enjoy a strong

presumption of constitutionality and that newly-passed statutes do not require judicial ratification in order to take effect.").

#### **B. Collier Has the Burden to Prove NRS § 34.726(1) Is Not Adequate**

The majority holds that: "Once a petitioner has demonstrated the inadequacy of a rule, the state bears the ultimate burden of proving the rule bars federal review." Majority Op. at 6224-25. Although the majority properly cites the standard, it mis applies the burden of proof because Collier never has established the inadequacy of NRS § 34.726(1). See Majority Op. at 6225, n. 6.

For ease of reference, I reiterate the Ninth Circuit's standard regarding the burden of proving the adequacy of a state rule:

Once the state has adequately *pled* the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

*Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir.2003) (emphasis added).

Thus, Step One is the state pleads a procedural bar. The burden is then shifted to the petitioner. Step Two is where the petitioner must demonstrate the inadequacy of the state procedural bar, including "citation to authority demonstrating inconsistent application of the rule."

The majority completely skips over Step Two, the step requiring a petitioner who claims a state procedural bar (here clearly stated in NRS § 34.726(1)) is not adequate, to prove the inadequacy of the bar. Collier has not alleged any specific factual allegations or cited us to any cases, nor can we find any, where the Nevada Supreme Court failed to apply NRS § 34.726(1), so that one could conclude NRS § 34.726(1) was not "well-established." Nor has he cited any cases where the Nevada Supreme Court allowed a motion to correct an illegal sentence to re-start either the time to file an appeal or the time to file a habeas petition. Thus, the state carried its burden under Step One by pleading NRS § 34.726(1) as a procedural bar. Collier has failed to carry his burden under Step Two.

Indeed, we have previously held that NRS § 34.726(1) is an independent and adequate state procedural rule barring federal habeas review. See *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir.2000); *Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir.1996). The majority's conclusion is directly at odds with *Loveland* and *Moran*. The majority concludes that because a case presenting Collier's precise factual situation had not been previously decided by the Nevada Supreme Court, the law must not be well-established. But this cannot be the



rule. The precise factual situations involved in *Loveland* and *Moran* had not been decided prior to those cases either. Nevertheless, we held that NRS § 34.726(1) barred federal review of those cases.

The only difference between *Moran*, *Loveland* and this case is that Collier filed *two* motions to correct an illegal sentence rather than the one motion filed in those cases. This difference makes no more distinction than the fact that Collier is not named *Loveland* or *Moran*.

This court has already soundly rejected the argument that for a procedural bar to be "well-established" a state court must have ruled that a particular attempt to circumvent that procedural bar is invalid. In *Bargas v. Burns*, 179 F.3d 1207, 1211 (9th Cir.1999), the petitioner made a similar attempt to circumvent Nevada's procedural bars. Bargas pleaded guilty to sexual assault in Nevada state court. He then filed a state habeas petition, claiming that he had ineffective assistance of counsel and that his plea was not knowing and voluntary. *Id.* at 1209-10. This petition was denied, but the trial court failed to rule specifically on his claim of ineffective assistance of counsel. Bargas appealed to the Nevada Supreme Court, but only on the ground that his plea was not knowing and voluntary. He failed to raise his claim of ineffective assistance of counsel. The Nevada Supreme Court affirmed the denial of his habeas petition. *Id.* at 1210.

Bargas then filed a habeas petition in federal court alleging ineffective assistance of counsel. The district court dismissed his petition, holding that his claim of ineffective assistance of counsel was unexhausted because he failed to assert this claim before Nevada's highest court. *Id.* at 1210.



Bargas then filed a second habeas petition in state court, attempting to "revive," as Collier did in his second motion to correct an illegal sentence, his claim that he had ineffective assistance of counsel and that his plea was not knowing and voluntary. *Id.* The trial court held that Bargas had procedurally defaulted on his ineffective assistance of counsel claim by not appealing the failure to rule on that issue in his first habeas petition. *Id.*

Bargas then filed a second habeas petition in federal court, again claiming he had ineffective assistance of counsel and that his plea was not knowing and voluntary. The district court denied the petition on the claim that Bargas' plea was not knowing and voluntary, but refused to reach the issue of ineffective assistance of counsel because that claim was barred by an independent and adequate state procedural bar—NRS § 34.726(1). *Id.* On appeal, we affirmed the district court's ruling that it had no jurisdiction to hear petitioner's federal habeas petition on the issue of ineffective assistance of counsel because Nevada's law that a habeas petitioner had to raise all his claims in his first petition was "well established," even though no Nevada case had yet held that a second habeas petition did not "revive" such claims:

[Bargas] argues that there are not any reported cases in Nevada specifically holding that a petitioner procedurally defaults a claim when he fails to appeal from the denial of post-conviction relief, and instead files a second petition for habeas corpus. Although we agree with that conclusion, Nevada law nevertheless clearly requires a petitioner to raise all

claims in his first petition, unless he can demonstrate cause and prejudice ...

*Id.* at 1211. The same is true here. Simply because no Nevada court had previously stated that a second motion to correct an illegal sentence does not re-start or toll the time in which to file a habeas petition, any more than a first such motion, does not mean the law was not well-established. NRS § 34.726(1) and NRAP 4(b) are both quite clear about what alone will toll the time to file an appeal and a habeas petition. All Collier had to do was read the relevant statutes. Although *Sullivan* was not decided at the time Collier was convicted, NRS § 34.726(1) was well-established. NRS § 34.726(1) was passed in 1991, well before Collier was convicted in 1995.

The plain language of NRS § 34.726(1) shows that motions to correct an illegal sentence do not re-start or toll the time in which to file a habeas petition. *See supra*, p. 6221. NRS § 34.726(1) states that *only* an appeal tolls the time in which to file a habeas petition. The majority opinion is reading possibilities into NRS § 34.726(1) that the plain language of that statute precludes. There are no cases where the Nevada Supreme Court allowed such a second, identical and denied motion to correct an illegal sentence to re-start or toll the time in which to file either an appeal under NRAP 4(b)(1) or a habeas petition under NRS § 34.726(1). Further, although the majority states that "Collier filed a second motion to correct an illegal sentence reviving the challenge to his sentence ..." (Majority Op. at 1282), this second motion was not a timely-filed motion to reconsider the denial of his first motion. Thus, it could not "revive" his first motion. Accordingly, we are bound by *Loveland* and *Moran*.

### **C. A Motion to Correct an Illegal Sentence Does Not Re-Start or Toll the Time in Which to File an Appeal**

Because the plain language of NRS § 34.726(1) states that an appeal will toll the time in which to file a habeas petition, we must examine whether Collier's direct appeal from his judgment of conviction was a valid appeal under Nevada law. It was not.

Under either the original judgment of conviction, entered on July 5, 1995, or the amended judgment of conviction, entered on March 26, 1997, Collier's appeal from his judgment of conviction, filed on November 16, 1998, was untimely and was therefore of no effect. Nev. R. App. P. 4(b). This rule was well-established at the time of Collier's conviction even under the majority's holding that there must be a case saying so. See *Lozada v. State*, 110 Nev. 349, 871 P.2d 944, 946 (1994).

Moreover, the amended judgment of conviction did not re-start the time period for Collier to file a direct appeal attacking his judgment of conviction under NRAP 4. The Nevada Supreme Court addressed a similar situation in *Morrell v. Edwards*, 98 Nev. 91, 640 P.2d 1322 (1982). There, the Nevada Supreme Court dismissed a civil appeal as untimely where the notice of appeal was not filed within thirty days of the original judgment, but was filed within thirty days of the amended judgment. The judgment had been amended to strike an award of costs. The court held that: "The test for determining whether an appeal is properly taken from an amended judgment rather than the judgment originally entered depends on whether the amendment disturbed or revised legal rights and obligations which the prior judgment had plainly and properly settled with finality." 640 P.2d at

1324. Here, the amended judgment of conviction did not revise the legal rights of the parties. The majority opinion dismisses *Edwards* because it was a civil case, but there is no reason the same principles would not apply to a criminal case.

Further, the majority opinion dismisses a similar holding in a criminal case *Burbank v. Rivers*, 20 Nev. 159, 18 P. 753, 755 (1888), as dusty old law. Majority Op. at 1285, n. 7. What the majority opinion refuses to acknowledge is that *Burbank* is still good law. In *Burbank*, the Nevada Supreme Court held that when a technical change is made to a judgment of conviction, the time within which an appeal may be taken from the judgment of conviction is computed from the date of the entry of the original judgment not the amended judgment, unless the party filing the appeal can show that he was "deceived" or "misled" by the original judgment as entered. *Burbank v. Rivers*, 20 Nev. 159, 18 P. 753, 755 (1888) (holding that a judgment that was amended to state the defendant's correct name did not start the time to file an appeal anew). Remember, the only change in the amended judgment (March 26, 1997) was to add the section number under which Collier was convicted. If that is not merely "clerical" or "technical," the words have lost their meaning. Here, there is no argument Collier was ever deceived or misled by the original judgment. By dismissing *Burbank* as too old, even though it has been followed and cited, [FN11] but never overruled, the majority establishes the bizarre rule that a statute is only well-established if a case has upheld the statute, but only if that case is not too old. Of course, the majority does not tell us at what point a case becomes overruled by operation of time.

FN11. See *Bottini v. Mongolo*, 197 P. 702, 704, 45 Nev. 245, 245 (Nev.1921).

The only way that Collier's appeal could be considered timely is if his second motion to correct an illegal sentence, which was filed on May 20, 1997, first revived and then tolled the time in which to file an appeal from his judgment of conviction. But that cannot be the case--under NRAP 4(b), only timely motions in arrest of judgment or for a new trial toll the time in which to file an appeal. See *supra* p. 6236.

Further, the majority states that "there is no established rule that motions to correct an illegal sentence do not qualify as an appeal from judgment, thus tolling the period for filing a habeas petition." Majority Op. at 6223. This is incorrect for two reasons. First, as discussed above, a motion to correct an illegal sentence presupposes that guilt was proved or admitted. An appeal from judgment posits innocence. Second, even if a motion to correct an illegal sentence were to qualify as an appeal, Collier failed to file his motion to correct an illegal sentence within the 30-day time limit under NRAP 4(b) and therefore, as an appeal, the motion was of no effect. *Lozada*, 871 P.2d at 946. "In the case of an untimely appeal, no 'appeal had been taken from the judgment' within the meaning of NRS § 34.726(1) because nothing has happened." *Dickerson v. State*, 114 Nev. 1084, 967 P.2d 1132, 1134 (1998) (defendant who was convicted of second degree murder filed an untimely appeal, and then filed a petition for writ of habeas corpus within one year of the issuance of the remittitur on his appeal, but not within one year of his judgment of conviction; the Nevada trial court dismissed the habeas petition as

untimely under NRS § 34.726(1); the Nevada Supreme Court affirmed, holding that under the language of NRS § 34.726(1) only a timely appeal tolls the one-year period in which to file a habeas petition).

The court in *Dickerson* held:

— We now construe NRS 34.726(1) to mean that the one-year period for filing a post-conviction habeas corpus petition begins to run from the issuance of the remittitur from a *timely* direct appeal to this court from the judgment of conviction if no direct appeal is taken. A timely direct appeal is one in which the notice of appeal is filed with the district court within the time period prescribed by statute. *See, e.g.,* NRAP 4.... In the case of an untimely appeal, no "appeal had been taken from the judgment" within the meaning of NRS 34.726(1) because nothing has happened.

Moreover, to construe the statute any other way would lead to absurd results.... If the appeal referred to in NRS 34.726(1) meant any appeal, whether this court obtained jurisdiction or not, petitioners would be able to file successive notices of appeal year after year and thus perpetually re-start the one-year limitation period. Clearly, this is not what the legislature envisioned. Indeed, this court has already noted that the statutory time periods are intended to prevent such results. "Without such limitations on the



availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies." *Lozada v. State*, 110 Nev. 349, 871 P.2d 944, 950 (1994)].

*Dickerson*, 967 P.2d at 1133-34.

Although it is true that *Dickerson* was the first Nevada case to hold that only a timely direct appeal tolls the time in which to file a habeas petition under NRS § 34.726(1), *Dickerson* was simply relying on the plain language of NRS § 34.726(1) and NRAP 4(b), and interpreting the intent of the legislature when it enacted NRAP 4(b). By concluding that Nevada law was not well-established prior to Collier's appeal, the majority opinion overlooks the plain language of NRS § 34.726(1) and NRAP 4(b)(1). It would be a supremely arrogant view of judicial importance to say that only judges can make law. Law does not have to be in the form of a judge's decision to be binding. Statutes and rules are also binding.

Here, under the majority's analysis, a Nevada prisoner can completely defeat both NRS § 34.726(1) and NRAP 4(b), and repeatedly re-start the time in which to file a state habeas petition, simply by filing a motion to correct an illegal sentence and then appealing the denial of that motion--even if the grounds alleged in the motion to correct an illegal sentence could have been brought up in a timely direct appeal from the judgment of conviction, or an appeal from an identical earlier motion, as is the case here.

There is no need for such a rule. Under Nevada law, petitioners who can show good cause for the delay can avoid the one-year limitation under NRS § 34.726(1).



*Dickerson*, 114 Nev. 1084, 967 P.2d 1132, 1134. To establish good cause to excuse a procedural default under Nevada law, "a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural rule that has been violated." *Lozada*, 871 P.2d at 946. Here, Collier has not shown good cause because, under Nevada law, the failure of counsel to advise a criminal defendant that he has the right to file a direct appeal is not good cause for failing to file a habeas petition within one year after judgment of conviction. *Dickerson*, 967 P.2d at 1134. [FN12]

FN12. Like Collier, *Dickerson* argued that his direct appeal was late because his counsel failed to tell him he had a right to appeal. 967 P.2d at 1133.

Prior to and at the time of Collier's conviction in 1995, it was well-established law that *only* the motions specified in NRAP 4 would toll the time in which to file a notice of appeal. See, e.g., *Chapman Indus. v. United Ins. Co.*, 110 Nev. 454, 874 P.2d 739, 741 (1994) (per curiam) (a motion for reconsideration is not a tolling motion under NRAP 4(a) and therefore does not re-start or toll the time in which to file a notice of appeal); *Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 732 P.2d 1376, 1379 (1987) (per curiam) (a motion to vacate an order affirming an administrative decision is not a tolling motion under NRAP 4(a) and therefore does not re-start or toll the time in which to file a notice of appeal). This was all well-established law at the time of Collier's conviction.

#### IV. Conclusion

The majority opinion allows a petitioner to resurrect an expired right to file a habeas petition attacking a judgment of conviction simply by filing a motion to correct an illegal sentence. This is contrary to Nevada law and to this court's holdings in *Loveland* and *Moran*.

Although the majority acknowledges that we have no power to second guess state court interpretations of state law, *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), that is exactly what the majority does. It second guesses NRS § 34.726(1) and NRAP 4(b), not to mention our own burden of proof rule stated in *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir.2003).

If Collier's original July 5, 1995 judgment of conviction is considered, Collier's November 16, 1998 notice of appeal was filed well after the thirty-day deadline in NRAP 4(b), and his May 28, 1999 habeas petition was filed well after the one-year deadline in NRS § 34.726(1).

If the March 26, 1997 amended judgment of conviction is considered (which it should not be), Collier's November 16, 1998 notice of appeal was filed after the thirty-day deadline in NRAP 4(b), and his May 28, 1999 habeas petition was still filed after the one-year deadline in NRS § 34.726(1).

The one-year deadline in NRS § 34.726(1) was at all times well-established law, and any way you look at this

case, Collier missed that deadline. Accordingly, I respectfully dissent.

## APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STEVEN W. COLLIER, ) No. 04-15017  
Petitioner - Appellant, )  
 ) D.C. No. CV-99-00641-  
vs. ) ECR/RAM  
 ) District of Nevada,  
 ) Las Vegas  
 )  
BOB BAYER, ) ORDER  
Respondent - Appellee. )  
 )  
\_\_\_\_\_  
Filed August 9, 2005

Before: B. FLETCHER, THOMAS, AND BEA, Circuit Judges.

Judges B. Fletcher and Thomas have voted to deny the petition for panel rehearing. Judge Bea votes to grant the petition for rehearing and petition for rehearing *en banc*. Judge Thomas votes to deny the petition for rehearing *en banc* and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P.35.

The petition for panel rehearing and the petition for rehearing *en banc* are denied.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

STEVEN WAYNE COLLIER,	)	
	)	Case No. CV-N-99-641
Petitioner,	)	ECR (RAM)
	)	
vs.	)	<u>ORDER GRANTING</u>
	)	<u>CERTIFICATE OF</u>
BOB BAYER, et al.,	)	<u>APPEALABILITY</u>
	)	
Respondents.	)	

Filed December 30, 2003

Petitioner has filed a Notice of Appeal contesting the dismissal of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and an Application for Certificate of appealability (#45). Respondents have opposed the application (#48). Pursuant to Fed. R. App. P. 22(b), this Court must issue a Certificate of Appealability pursuant to 28 U.S.C. § 2253 or state why a certificate shall not issue. 28 U.S.C. § 2253 (2) provides that a certificate of appealability is appropriate only if the petitioner has made

a substantial showing of the denial of a constitutional right. The standard for the issuance of a certificate of appealability calls for a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c). The Supreme Court has interpreted 28 U.S.C. § 2253 (c) as follows:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 (c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA



should issue when the prison shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The certificate shall be granted.

The petition was dismissed because the claim raised was procedurally barred and the court believed that the petitioner failed to make an adequate showing of cause and prejudice to overcome that bar. We are precluded from considering the merits of procedurally barred claims absent a showing of cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner seeks a certificate of appealability on three bases:

1. That the procedural bar applied by the Nevada Supreme Court and relied upon by this court is inadequate to foreclose federal review.
2. That Petitioner made an adequate showing of cause and prejudice to overcome the procedural bar.
3. That the propriety of applying procedural bars to his particular type of constitutional claim is questionable among jurists of reason.

The single ground for relief before the court was whether petitioner's rights to effective assistance of counsel under the Sixth and Fourteenth Amendment were denied when his counsel failed to consult with him regarding his right to an appeal and failed to file a notice of appeal on his behalf.

Petitioner has raised a valid showing of the denial of a constitutional right. The facts underlying his claim paint a picture of potential prejudice to petitioner due to a conflict of interest on the part of his defense counsel.

The second prong to our inquiry is whether jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484. The Nevada Supreme Court denied Petitioner's appeal of the state district court's denial of his post-conviction petition on the basis that it was filed more than one year after his conviction became final. Petitioner argues that Nevada law is unclear in its application of the tolling provision to motions to correct illegal sentences. He contends that the one-year period of time to file his habeas petition was tolled pending the issuance of remittitur of his appeal of denial of that motion.

We believe the circumstances are such that the issue could be "debatable among jurists of reason," whether another court could resolve the issues differently, or to cause us to decide that the showing was "adequate to deserve encouragement to proceed further."

*Slack*, 529 U.S. at 484, citing, *Barefoot v. Estelle*, 463 U.S. 880,

893 (1983). The watershed Nevada case determining the tolling of the one-year period for filing a state post-conviction petition, *Dickerson v. State*, was not decided until November 25, 1998. 114 Nev. 1084, 967 P.2d 1132 (1998). Petitioner's Motion to Correct Illegal Sentence was filed March 1997. Thus, until 1998, it was debatable in Nevada exactly which remittitur must issue before the one-year period of time to file a post-conviction petition would begin to run. Thus, issue one and two of the application should be allowed to proceed on appeal.

The third issue proposed for this appeal raises an obscure question of the appropriate avenue for addressing the type of constitutional claim arising under the holding of *Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000). Petitioner brought his claim under 28 U.S.C. § 2254 and then, late in the proceeding, sought leave to re-characterize his petition one seeking a writ of *audita querela*, contending this was defense or legal defect arising subsequent to the entry of

final judgment. Petitioner *cites Doe v. INS*, 120 F.3d 200, 203 (9<sup>th</sup> Cir. 1997) to support this contention. However, Petitioner chose his avenue for relief and should be bound by that choice. This issue does not meet the standard imposed by 28 U.S.C. § 2253 (2) or *Slack*.

A certificate of appealability will be granted as to basis one and two of the application, but denied as to basis three.

**IT IS THEREFORE ORDERED** that Petitioner's Application for Certification of Appealability (#45) is **granted in part and denied in part**. Bases and one and two of the application should be permitted to proceed on appeal. Basis three should not.

December ECR  
Dated this 30 day of ~~January~~, 2004.  
2003

/s/  
UNITED STATES DISTRICT JUDGE

## APPENDIX D

AO 450 (REV 5/85) Judgment in a Civil Case ☒

UNITED STATES DISTRICT COURT

\*\*\*\*\*

DISTRICT OF NEVADA

STEVEN COLLIER,	)	
	)	JUDGMENT IN
Plaintiff,	)	A CIVIL CASE
	)	
	)	CASE NUMBER
vs.	)	CV-N-99-0641-
	)	ECR(RAM)
BOB BAYER, et al.,	)	
	)	
Defendants.	)	
Filed March 28, 2003		

     **Jury Verdict.** This action came before the Court for a trial by jury.

The issues have been tried and the jury has rendered its verdict.

     **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

  X   **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.



**IT IS ORDERED AND ADJUDGED**

that petitioner's amended petition for writ of habeas corpus (Docket #17) is denied. Claim one is procedurally barred from federal review. The Clerk shall enter judgment accordingly.

March 28, 2003

Lance Wilson

Clerk

/s/

Lisa Mann

Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

STEVEN COLLIER,	)	
	)	Case No. CV-N-99-641
Petitioner,	)	ECR (RAM)
	)	
vs.	)	<u>MEMORANDUM</u>
	)	<u>DECISION ORDER</u>
BOB BAYER, et al.,	)	
	)	
Respondents.	)	
<hr/>		
Filed March 28, 2003		

Petitioner, Steven Collier, filed an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his sentence and conviction (Docket #14). Respondents, through their counsel the Attorney General for the State of Nevada, filed a motion to dismiss based upon exhaustion grounds. (Docket #21). The court issued an order finding Ground One exhausted and Ground Two unexhausted. (Docket #28). Petitioner was

given the option of abandoning the unexhausted ground and proceeding on the remaining fully exhausted ground, or dismissing the petition. Petitioner chose to abandon the unexhausted ground for relief. (Docket #29).

Respondents filed an answer to the remaining ground for relief. (Docket #35). Petitioner sought leave of court to file a traverse (Docket #36), which was granted. (Docket #37). Petitioner subsequently filed a notification to the court that he would not be filing a traverse. (Docket #38). Pending before the court at this time is Ground One of the amended petition.

The court has reviewed the entire record in this case, including all exhibits of the state proceedings, as well as all of the pleadings, motions and other documents filed in the record of this case. Following that review, the court concludes that petitioner's claim is procedurally barred from review.

1. Procedural Background

On May 17, 1995, petitioner pled guilty to one count of possession of a trafficking quantity of a controlled substance. (Ex. 48/49). In the plea agreement, the parties stipulated to a forty-five (45) year term of imprisonment. (Ex. 50). The petitioner was sentenced to a forty-five (45) year term of imprisonment. (Ex. 50).

On May 20, 1997, Collier filed a motion to correct illegal sentence. (Ex. 68). The State district court denied the motion. (Ex. 70). Collier appealed the denial to the Nevada Supreme Court (Ex. 71), and they issued an order dismissing the appeal. (Ex. 78).

On November 16, 1998, petitioner filed a notice of appeal concerning his conviction. (Ex. 74). The Nevada Supreme Court dismissed the appeal, finding the notice of appeal untimely, thereby divesting the court of jurisdiction. (Ex. 75).

On May 28, 1999, petitioner filed a post-conviction petition for writ of habeas corpus. (Ex. 80). The State district court denied the petition finding it was procedurally barred, and the petitioner unable to show cause and prejudice to overcome the bar.

(Ex. 87). Petitioner appealed the denial of his post-conviction petition to the Nevada Supreme Court. (Ex. 89). Prior to the Nevada Supreme Court deciding the appeal, petitioner filed the instant petition for federal habeas corpus. On January 11, 2001, the Nevada Supreme Court issued an order affirming the State district court's denial of the post-conviction petition. (Ex. 97).

## **2. Legal Discussion**

The court has thoroughly reviewed the facts of this case and has considered carefully all of the legal points and authorities presented by petitioner and respondents. Following that review, the court is fully appraised of the facts and circumstances regarding this matter, and finds

that further briefing by the parties is neither warranted nor required. Further, the court finds that the factual record has been adequately developed in the state courts relating to the issues presented in this petition. The court finds that no further factual development via an evidentiary hearing is required.

### 3. Procedural Default

The Federal courts will not review a question of state law decided by a state court if the decision of the state court rests on a state law ground that is independent of federal question and adequate to support the judgement. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state law ground is substantive or procedural and whether the default was caused by a failure to raise a claim at trial, a failure to raise a particular claim on appeal, or a failure to appeal at all. *Coleman*, 501 U.S. at 750.



It is well established that "[i]n order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F. 3d 1005, 1010 (9th Cir. 1994) (citing *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991); and *County Court v. Allen*, 442 U.S. 140, 150-51 & nn. 8-10 (1979)).

Nevada law provides in pertinent part: "Unless there is good cause shown for delay, a petition that challenges the validity of a judgment must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur." Nev. Rev. Stat. § 34.726.

In order to impose a procedural bar, the State court must clearly state that it relied on the procedural violation as its reason for rejecting the claims. See *Siripongs v.*

*Calderon*, 35 F.3d 1308 (9<sup>th</sup> Cir. 1994). Here, the Nevada Supreme Court clearly stated in its order that the petition was procedurally barred. (Ex. 97).

The Nevada Supreme Court has consistently applied the state rule which prohibits review of the merits of a claim presented in an untimely petition, unless the petitioner demonstrates cause. *Moran v. McDaniel*, 80 F.3d 1261, 1269 (9<sup>th</sup> Cir. 1996). Thus, the state procedural default rule at issue is adequate and independent.

Clearly, the petitioner's post-conviction petition for writ of habeas corpus was filed more than one year after the judgment and is untimely. Petitioner has violated the state's procedural default rule. Therefore, Claim One of the amended petition is barred from federal habeas review, unless the petitioner can establish cause for the procedural bar and prejudice by not having the claim addressed on the merits, or demonstrate a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991).

Cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impede counsel's efforts to comply with the state's procedural rule. Thus, cause may be established by showing that "the factual or legal basis for a claim was not reasonably available to counsel" or that there was "some interference by officials that made compliance impracticable." *Murray v. Carrier*, 477 U.S. 478, 488 (quoting *Brown v. Allen*, 344 U. S. 443, 486 (1953)). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. *Id.*; see also *Buffalo v. Sunn*, 854 F.2d 1158, 1163 (9<sup>th</sup> Cir. 1988).

Assuming petitioner was able to show cause for his procedural default, he also must show prejudice arising from the alleged constitutional errors. Petitioner must show more than the mere possibility of prejudice created by the trial court's constitutional errors. Petitioner must

show actual and substantial disadvantage, which infected the entire trial with error of constitutional dimensions. *United States v. Frady*, 456 U.S. 152, 170 (1982).

Petitioner argues that he can establish cause and prejudice to excuse the procedural default. See Petitioner's Legal Brief on Procedural Default, pp. 6-13. Petition argues that his trial counsel rendered ineffective assistance when he operated under a conflict of interest, and failed to consult with him concerning his right to pursue a direct appeal. Ineffective assistance of counsel may constitute cause, if the representation amounts to an independent Sixth Amendment violation. *Bonin v. Vasquez*, 999 F.2d 425, 428 (9<sup>th</sup> Cir 1993).

The United States Supreme Court has held that "[c]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (because there were non-frivolous grounds for

appeal), or (2) that his particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). "In making this determination, courts must take into account all of the information counsel knew or should have known." *Id.* "Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.*

If the court determines that counsel's performance in failing to consult with the defendant about an appeal "fell below an objective standard of reasonableness", the court must then apply the second prong of the *Strickland*<sup>1</sup> test which requires the defendant to show prejudice from counsel's deficient performance. *Roe v. Flores-Ortega*, 528 U.S. at 480-82. In order to show prejudice, a defendant

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

"must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Roe v. Flores-Ortega*, 528 U. S. at 484.

In considering whether petitioner's trial counsel had a constitutionally imposed duty to consult with petitioner concerning an appeal, the court must examine all of the relevant factors.

Petitioner alleges that he had seven appellate issues he would have raised on direct appeal, had such as appeal been taken. See Amended Petition, pp. 17-21. Despite allegations to the contrary, none of petitioner's alleged issues are potentially meritorious claims.

First, petitioner alleges that his right to conflict free representation, due process, equal protection and a reliable sentence were violated when he was represented by the public defender's office. The Sixth Amendment guarantee of effective assistance of counsel includes the

right to counsel's undivided loyalty. *Wood v. Georgia*, 450 U.S. 261, 271-72 (1981); *United States v. Baker*, 256 F.3d 855, 859-860 (9th Cir. 2001) (citing *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995)). To prevail on an ineffective assistance of counsel claim based upon conflict of interest, petitioner must show that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

Petitioner has failed to demonstrate an actual conflict of interest on the part of the public defender's office. Petitioner contends that the public defender's office represented the petitioner at the same time that they represented another person who was used as an informant in petitioner's case. A review of the record reveals that the informant was represented by the public defender's office in early 1994. (See Ex. 95). The informant entered into a guilty plea, and judgment was entered in March 1994. (See Ex. 95). On March 23, 1994, the informant was sentenced



to an indeterminate term of probation not to exceed three years. (See Judgment, Ex. 95). The criminal information was not filed against the petitioner until June 24, 1994. Petitioner plead guilty on May 17, 1995. Thus, petitioner's contention that the two were represented by the same office at the same time is belied by the record.

Second, petitioner claims that his trial counsel was ineffective for working under an actual conflict of interest. Claims of ineffective assistance of counsel may not be raised on direct appeal in Nevada. *Pellegrini v. Nevada*, 117 Nev. 860 (2001). Thus, even if counsel had filed a direct appeal, petitioner would not have been able to raise this issue on direct appeal.

Third, petitioner states that he would have argued that the trial court's failure to grant him substitute counsel and inquire into the alleged conflict between the petitioner and the public defender's office violated petitioner's constitutional right to the effective assistance of counsel.

In his amended petition, petitioner stated that he had a conflict with the public defender's office, because they did not show up to represent him in another pending case, and the public defender advised petitioner to waive his preliminary hearing despite the fact that petitioner provided the public defender with a letter from private counsel requesting a motion to dismiss be made at the preliminary hearing. Despite petitioner's contentions to the contrary, his allegations do not amount to a conflict of interest.

Fourth, petitioner argues that his arrest and conviction violated his due process rights, because the State violated the terms of its substantial assistance agreement. A review of the record indicates the substantial assistance agreement did not provide the petitioner with permission to possess narcotics. Possession of a narcotic was allowed only in a "controlled transaction". (See Ex. 11). Petitioner has failed to

demonstrate that this is a potentially meritorious claim.

Fifth, petitioner claims that the trial court erred in accepting petitioner's guilty plea without an affirmative showing that it was entered knowingly, intelligently and voluntarily. Challenges to the validity of a guilty plea may not be raised on direct appeal in Nevada, they must first be raised in the context of a post-conviction petition for writ of habeas corpus. *See Mitchell v. State*, 109 Nev. 137, 138 (1993).

Sixth, petitioner asserts that the State pursued two separate actions arising out of the same arrest, thereby violating the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.

Petitioner claims that the Nevada Department of Taxation's April 25, 1994, letter which imposed a tax debt and fine in the amount of just under two million dollars on the petitioner is a punishment, and that the State's subsequent criminal prosecution is a second punishment

for the same crime. The Nevada Department of Taxation has assessed the petitioner with a drug tax which, although it is a civil penalty, could arguably constitute punishment if the petitioner had paid the tax. Petitioner makes no allegation that he paid the tax. A review of the record demonstrates no payment of the tax, nor a judgment or other enforcement procedure by the government. Since petitioner did not pay the drug tax, and the government did not seek to enforce the drug tax, petitioner has not been punished within the meaning of the Double Jeopardy Clause. *U.S. v. Sanchez-Escareno*, 950 F.2d 193 (5<sup>th</sup> Cir. 1991). Therefore, this claim lacks merit.

Finally, petitioner claims that the statute under which he was sentenced was subsequently amended to provide a lesser penalty for those later convicted under the same statute. Petitioner claims that the statute's provision limiting its application to offenses occurring before its date of implementation is unconstitutional. Petitioner fails to

articulate any legal basis for his assertions.

An examination of other relevant factors reveals that petitioner, through his trial counsel, negotiated a plea bargain for the disposition of the criminal charges. (Ex. 49). Pursuant to the plea bargain, petitioner plead guilty to one count of possession of a trafficking quantity of a controlled substance. (Ex. 48). Petitioner benefited from the plea bargain in that he plead guilty to second level trafficking, as opposed to the third level trafficking with which he was originally charged. (Ex. 49, p.3). Additionally, the State dismissed another pending third level trafficking case and a simple possession charge against the petitioner. (Ex. 49, p.3). Petitioner stipulated to a forty-five (45) year sentence. (Ex. 49, p.3).

At sentencing, the trial judge gave petitioner the opportunity to make a statement as to why sentence should not be imposed. Petitioner declined to make a statement. (Ex. 50, p.5). The trial judge noted that the

parties has stipulated to a forty-five (45) year sentence, which was also the sentence recommended in the pre-sentence report. (Ex. 50, p.5). The judge recounted the physical evidence against the petitioner and stated that "[t]his demonstrates beyond doubt the defendant is a drug dealer and has been involved in narcotics transactions for a substantial period of time." (Ex. 50, pp. 5-6).

Following sentencing the State dismissed the pending third level trafficking charge and simple possession charge as agreed to in the plea agreement. (Ex. 55). Petitioner received the benefits he negotiated for in the plea bargain process.

A review of the record reveals that petitioner did not file a notice of appeal, or any other document indicating that he wished to appeal his conviction. Petitioner makes no allegation that he ever made any indication to his counsel that he wished to appeal.

A review of the totality of the circumstances shows



that petitioner has failed to demonstrate that counsel should have known that petitioner would have wanted to appeal. Therefore, petitioner has been unable to establish an independent Sixth Amendment violation.

Petitioner also argues that he was unable to timely file his post-conviction petition because of interference by State government officials. Specifically, petitioner claims that he tried, ultimately unsuccessfully, to obtain documents for over one year. Whether or not petitioner had difficulties in obtaining these documents is immaterial to petitioner's ability to timely file his petition. The documents petitioner was attempting to obtain are not necessary to file the petition.

Petitioner's claims are insufficient to establish cause to overcome the procedural bar.

**IT IS THEREFORE ORDERED** that petitioner's amended petition for writ of habeas corpus (Docket #17) is **DENIED**. Claim one is procedurally barred from federal



review. The Clerk shall enter judgment accordingly.

**IT IS FURTHER ORDERED** that petitioner's motion to accept a late pleading (Docket #39) is **GRANTED**. Petitioner's motion to refashion the pending 28 U.S.C. § 2254 petition into a motion to issue writ of Audita Querela (Docket #40) is **DENIED**.

**IT IS FURTHER ORDERED** that respondents' motion to strike petitioner's legal brief on procedural default and request to refashion pending 2254 petition as a request to issue writ of Audita Querela (Docket #41) is **DENIED**.

**IT IS FURTHER ORDERED** that petitioner's request for an evidentiary hearing (Docket #40) is **DENIED**.

Dated this 28 day of March, 2003.

/s/  
UNITED STATES DISTRICT JUDGE

**APPENDIX F**  
**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

STEVEN COLLIER,	)	
	)	
Petitioner,	)	CV-N-99-641-ECR
	)	
vs.	)	ORDER
	)	
BOB BAYER, et al.,	)	
	)	
Respondent.	)	
Filed August 28, 2001		

Respondents filed a motion to dismiss (#21) the petition for writ of habeas corpus. Petitioner filed an opposition to the respondents' motion to dismiss (#24), to which respondents replied (#25). After the Nevada Supreme Court dismissed petitioner's appeal of the denial of his state habeas corpus petition on February 6, 2001, petitioner filed and addendum to his opposition (#26), to which respondents replied (#27). For the following reasons, the court shall GRANT the motion to dismiss (#21).

In their motion to dismiss (#21) and other related motions (#25, 27), respondents assert that both grounds in the instant petition are unexhausted. Although petitioner, in his opposition (#24) and addendum (#26), repeatedly asserted that petitioner exhausted all grounds in state court, this court finds that petitioner exhausted Ground I in state court, yet failed to exhaust Ground II of the instant petition.

Both the Antiterrorism and Effective Death Penalty Act of 1996 and federal case law have specified the requirements for exhausting state remedies before a petitioner may file a petition for writ of habeas corpus in the federal courts. Until a state prisoner has exhausted his available state remedies for all claims raised, a federal court will not grant the prisoner's petition for habeas relief. *Rose v. Lundy*, 455 U.S. 509, 510 (1982) To exhaust a claim, petitioner must have "fairly presented" that specific claim to the Supreme Court of Nevada. See *Picard v.*

*Conner*, 404 U.S. 270,275-76 (1971); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1344 (9th Cir. 1984). Furthermore, a petitioner cannot merely allege exhaustion; the record must show that the petitioner sought review in the highest state court. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), cert. denied, 455 U.S. 1023 (1982). The petitioner also "must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law" in order to exhaust federal claims in state court. *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000). A federal court cannot hear a mixed petition (one that contains both exhausted and unexhausted claims for habeas corpus relief). *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982); *Greenawalt v. Stewart*, 105 F.3d 1268, 1273 (9th Cir. 1997), cert. denied, 519 U.S. 1102, (1997).

The instant petition contains two grounds for habeas relief. Ground I claims that petitioner's Sixth and Fourteenth Amendments rights were violated when

petitioner's trial counsel failed to inform him that he had a right to appeal his guilty plea, and when trial counsel failed to file a notice of appeal. Ground II claims that petitioner's Fifth and Fourteenth Amendment rights were violated when the trial court judge failed to inform petitioner, after accepting his guilty plea, that he had a right to appeal. In its review of the state court record, the court finds that Ground I of the instant petition was exhausted. Petitioner never specified which of his state court pleadings contained the arguments in Ground II of his federal petition. Nor did the court discover any thing in the state court record to indicate that petitioner fairly presented the claims in Ground II to the Nevada Supreme Court. Thus, the court finds that Ground II of the instant petition is unexhausted.

Therefore, the court shall grant respondents' motion to dismiss petition as mixed. Since the court did not examine the merits of the respondents' procedural

default arguments in their motion to dismiss, the court shall deny the procedural default arguments without prejudice, subject to renewal by incorporation at a later time.

**IT IS THEREFORE ORDERED** that respondents' motion to dismiss (#21) is **GRANTED**. Petitioner shall have thirty (30) days from the entry of this order on the record within which to inform the court whether petitioner wishes to formally and forever abandon the claims for relief set out in Ground II and wishes to pursue his petition with Ground I only. Alternatively, petitioner shall have thirty (30) days from the entry of this order on the record within which to inform the court that he wishes to return to state court to completely exhaust his petition. The failure to timely inform the court of his decision will result in the dismissal of the petition without prejudice as a mixed petition.

Dated this 27 day of August, 2001.

/s/  
UNITED STATES DISTRICT JUDGE



**APPENDIX G**  
**IN THE SUPREME COURT**  
**OF THE STATE OF NEVADA**

<u>STEVEN COLLIER,</u>	)	
	)	
Appellant,	)	<b>No. 34762</b>
	)	
vs.	)	-
	)	
WARDEN, NEVADA STATE	)	
PRISON, JOHN IGNACIO	)	
	)	
<u>Respondent.</u>	)	
Filed January 11, 2001		

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus.

On July 5, 1995, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a trafficking quantity of a controlled substance. The district court sentenced appellant to serve a term of forty-five years in the Nevada State Prison. On

March 26, 1997, the district court entered an amended judgment of conviction to include the relevant statutory provisions under which appellant was convicted. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction. *Collier v. State*, Docket No. 33382 (Order Dismissing Appeal, February 3, 1999).

On March 21, 1997, appellant filed a proper person motion to correct an illegal sentence in the district court. On May 28, 1997, the district court denied appellant's motion. This court dismissed appellant's appeal. *Collier v. State*, Docket No. 30578 (Order Dismissing Appeal, May 13, 1999).

On May 28, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent

appellant or to conduct an evidentiary hearing. On August 10, 1999, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition approximately four years after entry of the judgment of conviction and one and one-half years after entry of the amended judgment of conviction. Thus, appellant's petition was untimely filed. See NRS 34.726 (1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

In an attempt to demonstrate cause for the delay, appellant argued that he was deprived of a direct appeal because his trial counsel failed to inform him of his right to appeal. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate sufficient cause to overcome his delay. See Harris v. Warden,

114 Nev. 956, 964 P.2d 785 (1998); *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See *Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we affirm the order of the district court.

It is so ORDERED.<sup>2</sup>

_____ /s/ _____	J.
Shearing	
_____ /s/ _____	J.
Agosti	
_____ /s/ _____	J.
Leavitt	

cc: Hon. Brent T. Adams, District Judge  
Attorney General  
Washoe County District Attorney  
Steven Collier  
Washoe County Clerk

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<sup>2</sup> We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

APPENDIX H

IN THE SUPREME COURT  
OF THE STATE OF NEVADA

STEVEN W. COLLIER,	)	
	)	
Appellant,	)	No. 30578
	)	
vs.	)	
	)	
THE STATE OF NEVADA	)	
	)	
Respondent.	)	
Filed May 13, 1999		

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. On July 5, 1995, appellant was convicted pursuant to a guilty plea of one count of possession of a trafficking quantity of a controlled substance of between 14 and 28 grams.<sup>3</sup> See NRS 453.3385(2). The district court sentenced appellant to serve a term of forty-five years in the Nevada State Prison.

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<sup>3</sup> On May 26, 1997, the district court entered an amended judgment on conviction, which included the relevant statutory provisions under which appellant was convicted.

On March 21, 1997, appellant filed a motion to correct an illegal sentence in the district court. On May 28, 1997, the district court denied the motion, and this appeal followed. In the motion, appellant contended that his forty-five year sentence was illegal because the statute under which he was convicted, NRS 453.3385(2), provides for a minimum term of not less than two years and a maximum term of not more than fifteen years.

We conclude that appellant's contention lacks merit. At the time of appellant's offense in March 1994, NRS 453.3385(2) provided for a sentence of life or a definite term of no less than ten years. Appellant's forty-five year sentence was within the statutory limit. We recognize that NRS 453.3385(2) was amended in 1995 to reduce the penalty to a minimum term of two years and a maximum term of fifteen years. 1995 Nev. Stat., ch. 443, § 296, at 1288. However, that amendment became effective on July 1, 1995, and does not apply to offenses

committed before that date. 1995 Nev. Stat., ch. 443, §§ 393-394, at 1340. Thus, the amendment does not apply to appellant's sentence, as he committed the offense in 1994. Therefore, we conclude that the district court properly denied appellant's motion.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See *Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

Accordingly, we

ORDER this appeal dismissed. <sup>4</sup>

_____ /s/ _____	J.
Young	
_____ /s/ _____	J.
Shearing	
_____ /s/ _____	J.
Leavitt	

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<sup>4</sup> We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted. We deny appellant's motion for voluntary dismissal as moot.



cc: Hon. Brent T. Adams, District Judge  
Attorney General  
Washoe County District Attorney  
Steven W. Collier  
Washoe County Clerk

## APPENDIX I

### IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN WAYNE COLLIER,	)	
	)	
Appellant,	)	No. 33382
	)	
vs.	)	
	)	
STATE OF NEVADA	)	
	)	
<u>Respondent.</u>	)	
Filed February 3, 1999		

### ORDER DISMISSING APPEAL

This is a proper person appeal from a judgment of conviction. Our review of this appeal indicates that the district court entered the judgment of conviction on July 5, 1995. Appellant did not file the notice of appeal, however, until November 16, 1998, well after the expiration of the thirty-day appeal period prescribed by NRAP 4 (b). An untimely notice of appeal fails to vest jurisdiction in this court. See *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). Accordingly, we

conclude that we lack jurisdiction to consider this appeal,  
and we

ORDER this appeal dismissed. <sup>5</sup>

/s/ _____	J.
Young	
/s/ _____	J.
Shearing	
/s/ _____	J.
Leavitt	

cc: Hon. Brent T. Adams, District Judge.  
Hon. Frankie Sue Del Papa, Attorney General  
Hon. Richard A. Gammick, District Attorney  
Steven Collier  
Amy Harvey, Clerk

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<sup>5</sup> In the notice of appeal, appellant contends that his trial counsel failed to inform him regarding his right to directly appeal his conviction. We note that such a claim should be raised in the first instance in a post-conviction petition for a writ of habeas corpus filed in the district court. See *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). We express no opinion concerning whether appellant could satisfy the procedural requirements detailed in NRS chapter 34 or whether appellant would be entitled to relief pursuant to *Lozada*. See also *Dickerson v. State*, 114 Nev. \_\_\_, 967 P.2d 1132 JCR (Adv. Op. No. 119, November 25, 1998); *Harris v. Warden*, 114 Nev. \_\_\_, 964 P.2d 785 (1998).

APPENDIX J

No. CR94-1483

Dept. No. 6

IN THE SECOND JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR THE  
COUNTY OF WASHOE

STATE OF NEVADA,	)	
Plaintiff,	)	Reporter: R. Molezzo
	)	
vs.	)	
	)	AMENDED
STEVEN WAYNE COLLIER,	)	JUDGMENT
Defendant.	)	
	)	

Filed March 26, 1997

No sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Steven Wayne Collier is guilty of the crime of Possession of a Trafficking Quantity of a Controlled Substance, a violation of NRS 453.3385 and NRS 453.3405,

a felony as charged in Count I of the Amended Information, and that he be punished by imprisonment in the Nevada State Prison for the term of forty-five (45) years and payment of a fine in the amount of One Hundred Thousand Dollars (\$100, 000.00). The Defendant is given credit for four hundred ten (410) days time served commencing at the beginning of his term. The Defendant is further ordered to reimburse the County of Washoe the sum of Twenty-five Dollars (\$25.00) for the statutory administrative assessment fee and the Sixty Dollar (\$60.00) chemical analysis fee.

Dated this 5th day of July, 1995.

\_\_\_\_\_/s/  
District Judge

APPENDIX K

No. CR94-1483

Dept. No. 6

IN THE SECOND JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR THE  
COUNTY OF WASHOE

STATE OF NEVADA,	)	
Plaintiff,	)	Reporter: R. Molezzo
	)	
vs.	)	
	)	
STEVEN WAYNE COLLIER,	)	JUDGMENT
Defendant.	)	
	)	

Filed July 5, 1995

No sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Steven Wayne Collier is guilty of the crime of Possession Of A Trafficking Quantity Of A Controlled Substance as charged in Count I of the Amended Information and that he be punished by imprisonment in the Nevada State Prison for the term of forty-five (45)

years and payment of a fine in the amount of \$100,000.00. The defendant is further ordered to pay the \$60.00 chemical analysis fee and the \$25.00 administrative assessment fee. The defendant is given credit for 410 days time served commencing at the beginning of his term.

Dated this 7<sup>th</sup> day of July, 1995.

~ 3

B.A.

/s/  
DISTRICT JUDGE



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No. 05-589

FILED

JAN 30 2006

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

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GLEN WHORTON, Nevada Department of Corrections, et al., Petitioners,

v.

STEVEN WAYNE COLLIER, Respondent.

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**On Petition For A Writ of Certiorari  
To the United States Court Of Appeals  
For The Ninth Circuit**

---

**BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

---

FRANNY A. FORSMAN  
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For the District of Nevada  
\*JOHN C. LAMBROSE  
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\*Attorney of Record for Respondent

Glen Whorton, Nevada Department of Corrections, et al., Petitioners

v.

Steven Wayne Collier, Respondent


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MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS

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The Respondent, Steven Wayne Collier, asks for leave to file the attached Brief In Opposition To Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. No affidavit is attached, inasmuch as the District Court appointed counsel for Petitioner under the Criminal Justice Act of 1964.

Respectfully submitted,

  
JOHN C. LAMBROSE  
Assistant Federal Public Defender  
Counsel for Respondent

## QUESTIONS PRESENTED

1. Whether The Affirmative Defense Of Procedural Default Is Imbued With Any Presumption Of Adequacy When It Is Alleged In A § 2254 Proceeding?
2. Whether, After The State Alleges The Affirmative Defense Of Procedural Default, The Question Of The Adequacy Of That Default Is Placed In Issue Upon The Prisoner's Assertion, Pursuant To The Rule In Ford v. Georgia, That The Default Rule Was Not Clear, Or Well-Established At The Time Of The Purported Default?
3. Whether This Court's Long-Standing Rule That The State Must Assert The Affirmative Defense Of Procedural Default Necessarily Includes A Requirement That The State Has The Burden Of Proof As To The Propriety Of The Asserted Default?

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## STATEMENT OF THE CASE<sup>1</sup>

### A. The State Prosecution.

The Respondent (Collier) and a co-defendant Christopher Hammond ("Hammond") were charged in an eleven count information alleging various drug offenses ranging from possession of methamphetamine to possession with the intent to traffic in at least 28 grams of methamphetamine. Excerpts of Record (EOR) 146. The information was filed in the Second Judicial District Court in and for Washoe County (Reno) Nevada. Id. The offense conduct forming the factual basis for each of the eleven narcotics offenses was alleged to have occurred on the same day; March 12, 1994. Id. The information was filed in the trial court and was supported by the testimony of six witnesses who appeared at Collier's preliminary hearing. Id. at 33-67. Collier was represented by attorney Peter J. Sferrazza. Id.

Mr. Sferrazza began vigorously litigating Collier's case filing a myriad of compelling pretrial motions. See, e.g., Clerk's Record (CR) 15 (exhibits pertaining to pretrial motion practice). Pretrial litigation and sparring continued from June 1994 until January 13, 1995 at which time Mr. Sferrazza sought leave to withdraw because he would be beginning a job in the public sector.<sup>2</sup> CR 15 at Exh. 35. The trial court appointed the county public defender to represent Collier and on March 1, 1995 deputy public defender Joe Merkin ("Merkin") appeared as Collier's attorney at a status hearing continuing the trial. CR 15 at Exh. 45.

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<sup>1</sup> Citations to the record will be referenced as they were in the Court of Appeals except for references to the record that have been included in the Petitioner's Appendix (P.App.).

<sup>2</sup> The trial court ruled in favor of the State on each of the several pretrial motions that were filed.



Collier, however, was unaware of the fact that Merkin's colleague at the public defender's office (Thomas Mitchell) was representing the state's premier cooperating witness, a man named Gary McConnell. See EOR 33-67 (McConnell's preliminary hearing testimony) and 68-135 (Court documents relating to McConnell's own drug prosecution.). McConnell testified that he was a known drug dealer with charges pending against him and that in exchange for his cooperation as an instrument of entrapping Collier for the State he would receive probation. Id. at pp. 22 and 26.<sup>3</sup>

Without knowledge of this serious conflict of interest, Merkin persuaded Collier to enter a guilty plea to an amended information May 17, 1995. EOR 147-160. Collier was represented by deputy public defender Chester Kafchinski ("Kafchinski") at this proceeding. Id. There was no written plea memorandum. According to the hearing transcript, Collier agreed to plead guilty to Possession Of Trafficking Quantity Of A Controlled Substance in violation of Nev. Rev. Stat. 453.3385 and 453.3405, a crime carrying a minimum penalty of ten years and a maximum penalty of life in prison.<sup>4</sup> Id. Collier "stipulated" to a sentence of 45 years in prison. Id.

To add insult to injury Collier was represented by deputy public defender Mitchell at his sentencing hearing which occurred on July 5, 1995. EOR 161-167. Mitchell apparently never disclosed that he began representing McConnell (the government informant) in a major narcotics prosecution against him which began in January 1994. Id. 68-72. McConnell ultimately pled guilty to substantially reduced charges on February 15, 1994. EOR 103-120. Mitchell was at his side as

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<sup>3</sup> This Sixth Amendment deprivation of Collier's constitutional right to conflict-free counsel was pled as a sub-part to ground one of Collier's 28 USC § 2254 Amended Petition. EOR 17 and 18.

<sup>4</sup> The plea colloquy shows that Collier never admitted to any facts to support his guilt nor did the trial judge explain each and every element of the crime to Collier. EOR 147-160.

counsel. Id. McConnell could only receive probation on the crime if he cooperated and on March 12, 1994 he did just that when he set up Collier and Hammond. Id. at 33-67.

McConnell was sentenced on March 23, 1994. EOR at 123. Again, Mitchell was at his side as counsel. Id. Unfortunately, the transcript was sealed, no doubt due to the fact that Mitchell was advising the court as to McConnell's cooperation in the Collier/Hammond prosecution. Id. Admittedly, this is conjecture but, until a more reasonable inference (or the transcript is unsealed) is presented it makes sense. In short, Mitchell appeared as counsel for the target (Collier) of his previous client's (McConnell) cooperation. Id.

The sentencing hearing went off without a hitch and Collier received a 45-year sentence. EOR 161-167. Codefendant, Hammond, received a sentence of ten years. Id. Collier's judgment of conviction was entered on July 5, 1995. P.App. K-1. Collier did not file a notice of appeal.<sup>5</sup>

Collier spent the next year and a half trying to get his file from the public defender's office and the State court. CR 15, Exh. 56(a)-(e). Eventually, on March 21, 1997 Collier filed a Motion To Correct Illegal Sentence, pursuant to Nev. Rev. Stat. 176.555, alleging that the judgment of conviction was deficient because it failed to reference the statutory citation for the offense of conviction. EOR 169-180. Without waiting for a response from the State, the trial judge made the correction and on March 26, 1997 filed what the court fashioned as an Amended Judgment of Conviction.<sup>6</sup> P.App. J-1. Collier did not appeal from this Amended Judgment of Conviction.

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<sup>5</sup> These facts provide the basis of Collier's allegations set forth in Ground One of his § 2254 Amended Petition. EOR 14-21. Collier alleged that he was deprived of his constitutional right to a direct appeal from his conviction.

<sup>6</sup> Collier filed a Notice of Appeal from his July 5, 1995 Judgment of Conviction on November 16, 1998, and the Nevada Supreme Court dismissed that appeal on jurisdictional grounds (continued...)

On May 20, 1997, Collier filed another Motion To Correct Illegal Sentence, pursuant to Nev. Rev. Stat. 176.555 reasserting that the statute relevant to his offense of conviction was amended by the Nevada State Legislature on July 1, 1995 (four days prior to his July 5, 1995 sentencing) reducing the range of punishment from 25 years (minimum) to Life (maximum) to 2 years (minimum) to 15 years (maximum).<sup>7</sup> EOR 183-192. This time the trial court denied relief, on the merits, in a written order dated May 28, 1997.

Collier filed a timely appeal which was denied in an unpublished Order on May 13, 1999.

P.App. H-1. The Nevada Supreme Court reached the merits and held as follows:

We conclude that appellant's contention lacks merit. At the time of appellant's offense in March 1994, NRS 453.3385(2) provided for a sentence of life or a definite term of not less than ten years. Appellant's forty-five year sentence was within the statutory limit. We recognize that NRS 453.3385(2) was amended in 1995 to reduce the penalty to a minimum term of two years and a maximum term of fifteen years. 1995 Nev. Stat., ch. 443, § 296, at 1288. However, that amendment became effective on July 1, 1995, and does not apply to sentences committed before that date.

Id. Remittitur issued in June 1997. EOR 251.

On May 28, 1999 Collier filed a Petition for Postconviction Relief alleging that his conviction and sentence were in violation of the United States Constitution. EOR 255-331. The State of Nevada filed a motion to dismiss Collier's action alleging that it was untimely under Nev. Rev. Stat. 34.726(1). Nev. Rev. Stat. 34.726(1) (emphasis added) provides, in part, as follows:

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<sup>6</sup> (...continued)  
in an unpublished Order entered on February 3, 1999. P.App. I-1.

<sup>7</sup> Collier presented this argument in his first Motion To Correct Illegal Sentence but the trial court did not rule on that aspect of his Motion. See EOR 169-180 and P.App. J-1.

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur.

The state trial court entered a written order finding in favor of the State and concluded that Collier's 1999 postconviction action was untimely. EOR 335. Collier filed a Notice of Appeal (pro se) and on January 11, 2001 the Nevada Supreme Court entered an unpublished opinion affirming the district court. P.App. G-1. The Court held as follows:

Appellant filed his petition approximately four years after entry of the judgment of conviction and one and one-half years after entry of the amended judgment of conviction. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

In an attempt to demonstrate cause for the delay, appellant argued that he was deprived of a direct appeal because his trial counsel failed to inform him of his right to appeal. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate sufficient cause to overcome his delay. See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Id.

**B. The § 2254 Proceedings In The Federal District Court.**

On June 30, 2000 Collier filed an Amended § 2254 Petition setting forth the following two grounds for relief:<sup>4</sup>

Ground One: Collier was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel when counsel failed to consult with him regarding his right to an appeal and failed to file a notice of appeal on his behalf.

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<sup>4</sup> Ground One included seven sub-parts. EOR 1-23.

Ground Two: The trial court denied Collier his right to equal protection and due process of law under the Fifth and Fourteenth amendments when it accepted his guilty plea and sentenced him without advising him of his right to an appeal.

EOR 1-23. The Petitioner filed a motion to dismiss arguing that the grounds were both unexhausted. *Id.* 360. The district court entered an interim order finding ground one and its sub-parts to be exhausted but concluded that ground two was unexhausted. P.App. F-1. Collier abandoned ground two and the Petitioner was ordered to file an Answer. *Id.* 392.

The Petitioner filed an Answer to ground one asserting that it was not cognizable because it had been decided on adequate and independent state law grounds. EOR 395. The Petitioner cited the district court to the January 11, 2001 Nevada Supreme Court opinion dismissing Collier's state postconviction relief action. *Id.* See also P. App. G-1. The Petitioner argued that, since the highest state court concluded that Collier had violated the one year rule set forth in Nev. Rev. Stat. 34.726(1), ground one was procedurally defaulted. *Id.*

Collier filed legal briefing arguing that the Nevada default rule was not adequate because, under the unique circumstances of his case, it was not clear that he had, in fact, violated the rule.<sup>9</sup> EOR 407-430. Collier began by contending that the trigger date for the one year rule set out in Nev. Rev. Stat. 34.726(1) started on March 26, 1997 - the date that the amended judgment of conviction was filed. *Id.* at 413. He went on to argue that, the May 20, 1997 Motion to Correct Illegal Sentence action tolled § 34.726(1)'s one year deadline and that since that action was pending until the Nevada Supreme Court's June 9, 1999 (decision denying relief on the merits), the state

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<sup>9</sup> Collier entitled this pleading as follows: "Petitioner's Legal Brief On Procedural Default And Request To Refashion Currently Pending 2254 Petition As A Request To Issue Writ Of Auditor Querela." EOR 407-429.

habeas action (filed on May 28, 1999) was timely. Id. Finally, Collier concluded by asserting as follows: "Thus, the State has not, and will not, be able to meet its burden of demonstrating the procedural bar at issue is sufficiently adequate to bar federal merits review." Id. 415. Collier also argued that cause and prejudice existed to overcome the default.

The Petitioner did not respond to Collier's briefing on this question. Instead, the Petitioner elected to move to strike Collier's brief. CR 41. Over four months after Collier's unanswered challenge to the adequacy of the alleged default, the district court ruled in favor of the Petitioner. P.App. E-1. The district court did not rule on the Petitioner's motion to strike but did acknowledge Collier's briefing on the question of the propriety of the purported default. P.App. E-4 ("The court has thoroughly reviewed the facts of this case and has considered carefully all of the legal points and authorities presented by petitioner and respondents.") The district court went on to summarily reject Collier's arguments regarding adequacy and cause and prejudice. Id.

Collier appealed and sought a certificate of appealability from the district court on April 24, 2003. EOR 445. Collier argued, in part, that the procedural default was not adequate and that the Petitioner failed to prove otherwise. Id. 448. The district court rejected Collier's argument but did concede that "jurists of reason" could come to a different conclusion as to whether Nevada law clearly barred federal review of Collier's claim. P.App. C-5 and 6. The district court granted a Certificate of Appealability on the following two questions:

1. That the procedural bar applied by the Nevada Supreme Court and relied upon by this court is inadequate to foreclose federal review.

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2. That Petitioner made an adequate showing of cause and prejudice to overcome the procedural bar.

Id. C-7

C. The Proceeding In The Court Of Appeals

The gravamen of Collier's argument on appeal to the Ninth Circuit was that the Nevada default rule precluding federal review of his § 2254 claim was not clear or well-established and, therefore, not adequate as defined by this Court's decision in Ford v. Georgia, 498 U.S. 411 (1991). Collier argued, in part, as follows:

The procedural rule invoked to preclude federal review in this case states that a "challeng[e] to the validity of a judgment or sentence" needs to be filed within a year of the judgment or if there was an appeal within a year of remittitur. Nev. Rev. Stat. 34.726(1) (emphasis added). That is precisely what happened in this case. This defeats the State's contention that application of 34.726 under these circumstances is adequate to foreclose federal review.

Collier recognizes Nevada Revised Statutes 34.726(1) has been found to be adequate by this Court in a case with an unrelated procedural history. Moran v. McDaniel, 80 F.3d 1261, 1269 (9th Cir. 1996). Nevertheless under the unique circumstances of this case the rule cannot be deemed adequate. See Lee v. Kemna, 534 U.S. 362, 364 (2002). Collier, a pro se litigant, could reasonably have believed a Motion to Correct an Illegal Sentence tolled 34.726 because such a Motion arguably "challenges the validity of a judgment or sentence." At the time of Collier's purported default, no clear precedent from the Nevada Supreme Court existed foreclosing the type of post conviction/sentencing litigation Collier pursued. This state of ambiguity renders application of the state default inadequate to foreclose federal review. Cf. Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

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There was no clear and concise rule, in Nevada, which precluded Collier from challenging an Amended Judgment of Conviction with a Motion To Correct An Illegal Sentence and upon completion of that challenge commence a state habeas action within one year. Nev. Rev. Stat. 34.726(1) did not preclude that plan of attack and the Nevada Supreme Court had not construed that statute in the procedural context of this case at the time of Collier's purported default. For the reasons stated, the procedural default invoked by the court below was not adequate. Ground One should be heard on the merits.

Appellant's Opening Brief (AOB) at 13-15. The Petitioner took the position that Nevada law was clear on this question and that, as a matter of federal law, the default imposed by the Nevada Supreme Court was adequate. Respondent's Answering Brief (RAB) at 14-16.

On June 3, 2005 the Court of Appeals entered a published opinion reversing the district court holding as follows:

The Nevada procedural rules applied by the Nevada state courts to bar Collier's habeas petition are not adequate to preclude federal review of his habeas petition. The rules applying Nev. Rev. Stat. 34.726(1) were not clear, consistently applied, and well-established at the time of Collier's purported default. When Collier filed his motion to correct an illegal sentence in 1997 and subsequent habeas petitions, it appeared under state law a habeas petition could follow a remittitur from such an appeal and amended judgment. The district court's opinion is reversed and the appeal is remanded for consideration on the merits.

Collier v. Bayer, 408 F.3d 1279, 1288 (9th Cir. 2005), see also P.App. A-1.<sup>10</sup> The Petitioner's request for rehearing and en banc review was denied on August 9, 2005.

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<sup>10</sup> The Court of Appeals did not reach Collier's alternative argument that cause and prejudice existed to overcome the purported default. 408 F.3d at p. 1280.

### ARGUMENT SUMMARY

It is well-settled that a federal court cannot hear a challenge to a state court prisoner's conviction and sentence pursuant to § 2254 if the highest state court decided the question on an adequate and independent state law ground. In Collier's case the state rule was procedural in nature. This case turns solely on the question of adequacy and this Court has defined that term to mean a rule that was clear, well-established and consistently applied at the time of the prisoner's default. This Court has consistently held that the State must plead the affirmative defense of procedural default in a § 2254 action or risk waiving it as a bar to review of the prisoner's claim.

The Court of Appeals concluded that the rules applied by the Nevada Supreme Court to bar Collier's review of his state postconviction relief action were not clear or well-established and for that reason, could not preclude federal review. This conclusion was predicated upon, *inter alia*, Collier's contention that no clear rule existed and the Petitioner's inability to disprove that assertion. In other words, the Petitioner was unable to provide sufficient support for the assertion that the affirmative defense of procedural default was viable in Collier's case. The Petitioner failed to carry the day on this critical issue.

The Petitioner now seeks certiorari on three separate questions that are interrelated. Each question deals with the evidentiary nature of the affirmative defense of procedural default in § 2254 actions. None of the questions posed in the Director's Petition are worthy of review by this Court. This case was decided in Collier's favor because the default rule was not clear and well-established. Once the affirmative defense was asserted he simply needed to allege that no Nevada rule existed at the time of his default that could preclude review of his § 2254 claim. The Petitioner did not prove otherwise. Consequently, the very nature of this case does not easily lend itself to the subtle

nuances of the § 2254 evidentiary burden-shifting analysis inherent in the Petitioner's certiorari questions. Most importantly, because the Nevada procedural rules were not clear or well-established Collier would prevail in this Court no matter how the questions were resolved. In short, certiorari review on any or all of the proffered questions cannot effect the decision of the Court of Appeals given the unique nature of Collier's case.

Finally, each of the questions presented have been resolved by this Court in previous cases. First, there is no presumption of adequacy or, for that matter independence, inherent in a state procedural default rule. Second, procedural default is a waivable affirmative defense that becomes a federal issue once it's adequacy and/or independence is challenged by a § 2254 petitioner. Finally, the burden of proof regarding the viability of the affirmative defense of procedural default always remains with the party asserting that defense. That will always be the State in a § 2254 action. The Fifth Circuit's eccentric rule ascribing the burden to the prisoner is not supported by any case decided by this Court. The Fifth Circuit is all alone on this evidentiary point but Collier submits that the circuit split resulting from this is not important enough to warrant review by this Court, especially given the unique nature of Collier's case, i.e., Collier would prevail under either version of the circuit split.

For the reasons stated below Collier respectfully asks this Court to deny the Petitioner's request for certiorari.

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## REASONS FOR DENYING THE WRIT

### A. Certiorari Review Of Any Or All Of The Questions Presented Would Not Change The Decision Of The Court Of Appeals.

This case turned on whether the Nevada procedural rules invoked to preclude federal review were adequate. Collier v. Bayer, 408 F.3d 1279, 1284 (9th Cir. 2005). Specifically, Collier argued that the rules were not clear or well-established at the time of his default. The Court of Appeals considered the adequacy of the state procedural rules in accordance with the analytical framework imposed by this Court's case law. 408 F.3d at 1283-84, citing Coleman v. Thompson, 501 U.S. 722, 729 (1991), Ford v. Georgia, 498 U.S. 411, 423-24 (1991), and Lee v. Kemna, 534 U.S. 362, 376 (2002). The Court of Appeals correctly concluded that at the time of Collier's purported default Nevada law was unclear and therefore, inadequate, as to whether an amended judgment restarts the § 34.726 one year clock<sup>11</sup> and whether the pendency of a Motion to Correct an Illegal Sentence tolls that clock. 408 F.3d at p. 1288.

The Court of Appeals generally supported this construction of federal law by noting that the Nevada Supreme Court did not clarify the confusion surrounding an amended judgment's effect on § 34.726(1)'s one year clock until September 3, 2004 when it decided Sullivan v. State, 96 P.3d 761, 764 (Nev. 2004). 408 F.3d at 1285. The Court also noted that the State of Nevada sought

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<sup>11</sup> The Nevada Supreme Court evidenced this lack of clarity regarding amended judgments in its January 11, 2001 decision denying state habeas relief. P.App. G-3 "[Collier] filed his petition approximately four years after entry of the judgment of conviction and one and one-half years after entry of the amended judgment of conviction."(emphasis added). The federal district court's order granting a COA implicitly assumed that the March 1997 amended judgment restarted the one year clock also. P.App. C-6 (The district court must have assumed that the amended judgment started the one year clock because the gravamen of the Court's analysis dealt with whether the period of time between the amended judgment (March 26, 1997) and the pendency of the Motion To Correct An Illegal Sentence tolled the one year clock.).

publication of the Sullivan decision from the Nevada Supreme Court and inferred from that request a desire on Nevada's part to clarify the issue.<sup>12</sup> Id. at p. 1286 n.8 ("The cause for publication is not mentioned. Given the lack of guidance on this issue in prior opinions, the need for publication is consistent with the need to establish the rule.")(emphasis added).

The Court of Appeals continued its federal review of adequacy when it found that Nevada law did not clearly preclude the tolling of § 34.726(1)'s one year period during the pendency of a Motion To Correct An Illegal Sentence until the Nevada Supreme Court decided Dickerson v. State, 967 P.2d 1132, 1133-34 (Nev. 1998). 408 F.3d at p. 1287. The Court of Appeals noted the Nevada Supreme Court's holding in Dickerson: "We now construe [Nev. Rev. Stat.] 34.726(1) to mean that the one year period for filing a postconviction habeas corpus petition begins to run from the issuance of the remittitur of a timely direct appeal to this Court from the judgment of conviction or from the entry of the judgment of conviction if no appeal is taken. A timely direct appeal is one in which the notice of appeal is filed with the district court within the time period prescribed statute." Id. quoting Dickerson v. State, 967 P.2d at 1133-34 (emphasis added and in original). Since the Dickerson decision was a new rule established in 1998 it could not operate Collier's purported default which occurred prior to that rule.

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<sup>12</sup> It should be noted that the Washoe County District Attorney sought publication in Sullivan and that same office prosecuted Collier.

The Petition for Certiorari did not explain that nature of the Collier decision. Instead, it superficially asserted that both of the above rules were clear and well-established at the time of Collier's purported default. This assertion falls flat. A review of this Court's analysis in Ford v. Georgia, 498 U.S. 411, 423-24 (1991) supports the decision of the Court of Appeals. This Court observed as follows:

In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458, 78 S.Ct. 1163, 1169-1170, 2 L.Ed.2d 1488 (1958). In the NAACP case, we declined to apply a state procedural rule, even though the rule appeared "in retrospect to form part of a consistent pattern of procedures," because the defendant in that case could not be "deemed to have been apprised of its existence." *Id.*, at 457, 78 S.Ct., at 1169. In James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), we held that only a "firmly established \*424 and regularly followed state practice" may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim. *Id.*, at 348-351, 104 S.Ct., at 1835-1837.

Id. (emphasis added).

The Petitioner contends, without providing much analysis, that Nevada's rules were sufficiently clear to preclude federal review and that the panel's decision conflicted with Ninth Circuit precedent. Petition at p. 14 citing Bargas v. Burns, 179 F.3d 1207, 1211 (9th Cir. 1999). The Court of Appeals obviously concluded that Ford v. Georgia controlled this question when the full court rejected the Petitioner's request for en banc review. P.App. B ("... no judge has requested a vote on whether to hear the matter en banc.").

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Collier submits that the two Nevada rules found to be inadequate by the Court of Appeals were so unclear as to render that conclusion indisputable. Consequently, should this Court grant certiorari on any one of the three proffered questions no matter how the Court decided the respective issue the result in this case would be the same; Collier would prevail. This Court need not waste its time rendering advisory opinions. See generally Colorado v. Nunez, 465 U.S. 324, 327-28 (1984)(Stevens, J., concurring).

**B. This Court Has Never Cloaked The Affirmative Defense Of Procedural Default With A Presumption Of Adequacy.**

This Court has long held that procedural default is an affirmative defense that can be waived if not properly asserted. Gray v. Netherland, 518 U.S. 152, 165-66 (1996) ("because procedural default is an affirmative defense for the Commonwealth . . . the Commonwealth would have been obligated to raise procedural default as a defense or lose the right to assert the defense thereafter."). The Petitioner contends that Dugger v. Adams, 489 U.S. 401, 410 n.6 (1986), Harris v. Reed, 489 U.S. 255, 262-265 (1989), and Johnson v. Mississippi, 486 U.S. 578, 587 (1988) "suggests" that state procedural rules must be presumed adequate. Petition at pp. 9 and 10. Not one of these cases stand for such a suggestion. The only consistent theme running through these cases is that a state rule is adequate if it is clear, well-established and consistently applied and that determination is a question of federal law.

The Petitioner correctly observes that the Fifth Circuit presumes adequacy.<sup>13</sup> Sones v. Hargett, 61 F.3d 410, 416 (5th Cir. 1995) citing Harris v. Reed, 489 U.S. at p. 262. A careful review

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<sup>13</sup> However, the Petitioner's assertion that the Fourth, Smith v. Dixon, 14 F.3d 956, 972 (4th Cir. 1994) and Seventh, Prihoda v. McCaughtry, 910 F.2d 1379, 1384 (1990), Circuits "appear to find such a presumption" is simply wrong. Petition at p. 10. A close inspection of each of those cases does not reveal even an "appearance" of such a proposition.



of the Harris decision at page 262, specifically, or anywhere in the opinion, generally, does not reveal support for this rogue presumption. Harris simply holds that if the highest state court decides a case on both the merits and procedural grounds, if the procedural ruling is clear, it will operate as an adequate bar to federal review. Dugger and Johnson are simply cases that illustrate how federal courts are to analyze the question of adequacy when it is called into question by the prisoner. See generally 489 U.S. at p. 410 n.6 and 486 U.S. at p. 587.

This Court has never held that a federal court must presume adequacy when a procedural default is alleged and the Fifth Circuit's eccentric contrary conclusion is difficult to fathom. Nevertheless, under the unique facts of this case Collier would clearly prevail; even under the Fifth Circuit's presumption matrix. 61 F.3d at p. 416-17 (noting the relative ease at which a prisoner is able to rebut the "presumption"). This question is not worthy of review.

C. The Adequacy Of A Procedural Default Is Placed In Issue Once A Prisoner Alleges That The Rule Was Not Clear Or Well-Established At The Time Of The Default.

The above statement is not ground-breaking. It simply recites this Court's jurisprudence on this issue at least since Coleman v. Thompson, 501 U.S. 722 (1991) was decided. Procedural default is an affirmative defense that must be raised or it will be waived. Gray v. Netherland, *supra*. The Tenth Circuit put some context to how the analysis should work when the consistent application and regularly followed prong of the adequacy requirement is at issue. In Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999) the court fleshed out a logical burden-shifting procedure. Once the affirmative defense of procedural default was alleged by the State the prisoner would then be obliged to place the adequacy of the rule in question through "specific allegations" challenging the federal viability of the defense. *Id.* The court concluded that the ultimate burden

of proof should, in all fairness, remain with the State (party asserting the defense). Id. See also Cannon v. Gibson, 259 F.3d 1253, 1273 n.20 (10th Cir. 2001) (the state bears the ultimate burden of proving a procedural default is adequate).

The Ninth Circuit adopted this burden-shifting procedure in Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2002);

Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

The Bennett court observed that the Tenth Circuit's reasoning (burden should be on the moving party and generally the State is at an advantage because the prisoner is pro se) was persuasive and that the process would ensure fairness. Id. at 585-86. This burden-shifting procedure is consistent with this Court's desire to ensure that the federal court's scrutiny of adequacy is deliberate, thorough, and fair taking into consideration both respect for comity and the consequences at stake for the prisoner. See generally, Coleman v. Thompson, *supra*.

The upshot is that once the affirmative defense of procedural default is pled the prisoner need only assert specific factual or legal allegations to support his contention that the default rule is not adequate.<sup>14</sup> Collier certainly satisfied that obligation both in the district court, see EOR 412-415, and on direct appeal. See AOB at pp. 12-15. In fact, Collier cited the district court to the Ninth Circuit's decision in Bennett v. Mueller, *supra*. See EOR 415.

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<sup>14</sup> At least one trial court has found this "step two" obligation assigned to the prisoner to be a "modest" one. Dennis v. Brown, 361 F.Supp. 2d 1124, 1130 (N.D. Calif. 2005).

The Petitioner, as discussed earlier, did not respond with any facts or legal argument after Collier placed adequacy in issue in the district court. Nevertheless, the Petitioner now disingenuously complains that "Collier did not allege any specific factual allegations or cite to any cases where the Nevada Supreme Court failed to apply NRS (sic) 34.726 consistently, so that one could conclude that NRS (sic) 34.726 was not 'well-established.'" Petition at p. 16. The Petitioner is wrong for two reasons. First, Collier did allege, with specificity, that the default rules were not clear and well-established. He did it in the district court. He also did it in the Court of Appeals. The Petitioner's contrary assertion misrepresents the record. Second, Collier did not need to prove that the rules were not consistently applied as a condition precedent to alleging they were not clear and well-established. The Petitioner simply does not understand the law of procedural default. The Court of Appeals (majority opinion) made this point in response to the dissent as follows:

The dissent argues that the petitioner must cite cases in which a procedural bar is applied inconsistently. Dissent at 6245. Inconsistency is only one aspect of the principle that a state's procedural bar must be adequate. This court has repeatedly said the state's rule must be clear, consistently applied, and well-established. See e.g., Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004); Melendez v. Warden, 288 F.3d 1120, 1122 (9th Cir. 2002); Jackson v. Calderon, 211 F.3d 1148, 1153 (9th Cir. 2000). The emphasis in the case before us is whether the rule was well-established. We, obviously, do not require a habeas petitioner to show inconsistency in application when the problem with the rule is that the rule is not clear or well-established and has never been applied to the unique circumstances of this case.

408 F.3d at p. 1484 n.5 (emphasis added).

Collier certainly satisfied any obligation he may have had to challenge the adequacy of the purported default rules. This question is not worthy of certiorari review.

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**D. The Burden Of Proving The Adequacy Of A Procedural Default Always Remains With The Party Asserting That Default.**

Both the Tenth and Ninth Circuits have construed this Court's habeas jurisprudence to require a rule that places the burden of proving that a default is adequate on the party asserting the procedural default as an affirmative defense. Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999); Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003). The Second Circuit has not squarely reached the issue but will, in all likelihood, follow the Tenth and Ninth Circuit's reasoning. Cotto v. Herbert, 331 F.3d 217, 238 (2d Cir. 2003) ("Because the procedural bar is a defense to a habeas claim, we assume without deciding that the state bears the burden of proving the adequacy of the state procedural rule.").

The Fifth Circuit stands alone on this question and, without providing any of the analysis set out by the Tenth Circuit, requires the prisoner to assume the burden of proof. Stokes v. Anderson, 123 F.3d 858, 860 (5th Cir. 1997). The Stokes court cited to an earlier Fifth Circuit decision entitled Sones v. Hargett, 61 F.3d 410, 416 (5th Cir. 1995). The Sones decision found a presumption of adequacy existed in all procedural defaults but that the prisoner could rebut the presumption "in certain circumstances." 61 F.3d at pp. 416-17. The Sones decision relied on Harris v. Reed *supra* for this presumption theory but did not expressly find that the prisoner had the burden of proof. *Id.* Later, in Stokes v. Anderson, *supra*, the Fifth Circuit, citing to Sones expressly placed the burden on the petitioner. 123 F.3d at p. 860. Neither decision provided any rationale for this odd conclusion and, more importantly, made no attempt to reconcile their decision with this Court's contrary jurisprudence.

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The Petitioner urges this Court to grant certiorari on this question because it "presents the opportunity to resolve" the circuit split caused by the Fifth Circuit's odd rule. Petition at p. 13. The split does not present the sense of urgency heralded by the Petitioner. Even though the Fifth Circuit arrived at the wrong conclusion the question simply need not be resolved under the unique facts of Collier's case. The case does not lend itself to a proper vetting of the merits of the Tenth Circuit's conclusion that the burden always rests with the State because this is not a consistent application case. Further Collier would win under either standard. Review is not warranted on this question.

**CONCLUSION**

Collier respectfully asks that this Court deny the Petition For Writ Of Certiorari.

Dated this 30th day of January, 2006.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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Corrections, et al.,

Petitioners,

v.

STEVEN WAYNE COLLIER,

Respondent.

CV-N-99-0641-ECR(RAM)  
(Reno, Nevada)

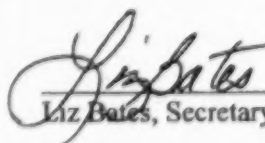
CA No. 04-15017

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 30, 2006, she served a copy of the attached Brief in Opposition to Petition for Writ of Certiorari by personally placing a copy in the United States mail, postage paid to the addressees named below:

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